STATE OF OHIO, Plaintiff-Appellee, -vs- BRIAN M. BRANT, Defendant-Appellant.

CASE NO. 99-P-0037

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, PORTAGE COUNTY

2000 Ohio App. LEXIS 3540

August 4, 2000, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Civil appeal from the Court of Common Pleas. Case No. 94 CR 0158.

DISPOSITION: Reversed and remanded for a new trial.

CASE SUMMARY:

PROCEDURAL POSTURE: Following defendant's conviction on three counts of rape and one count of kidnapping, defendant appealed decision of Portage County Court of Common Pleas (Ohio) denying motion for postconviction relief premised upon claim that trial counsel was ineffective for failing to present testimony from available expert witness on issue of consent.

OVERVIEW: Following defendant's conviction on three counts of rape and one count of kidnapping, defendant appealed a decision of the trial court denying his motion for postconviction relief which was premised upon a claim of ineffective assistance of counsel. At trial, plaintiff prosecution had presented testimony of an expert witness opining that the victim had been subjected to forced sexual penetration. Defendant claimed that trial counsel was ineffective for failing to present testimony from an available expert witness who would have testified that in her opinion the victim was not subjected to forced vaginal penetration, thus rebutting the testimony of plaintiff's expert witness in that regard. The court concluded that defendant's trial counsel was ineffective, reversing the trial court and remanding for a new trial. The court concluded that in light of the issue of consent and plaintiff's expert's testimony in that regard, it was not debatable that defense counsel should have called its available expert to testify. Also, prejudice was established, as there was a reasonable probability that the trial would have resulted in a different outcome if defendant's expert had testified.

OUTCOME: Trial court's decision was reversed and case was remanded for a new trial. In context of this rape trial, court concluded that defendant's trial counsel was ineffective for failing to call an available expert witness who would have opined that the victim was not subjected to forced vaginal penetration.

CORE TERMS: nurse, assistance of counsel, reasonable probability, ineffective, rape, sexual, postconviction, convicted, intercourse, expert witness, penetration, assignments of error, counsel's failure, confidence, vagina, physical evidence, probability, prejudicial, consensual, symptoms, vaginal, doctor, night, sexual penetration, direct appeal, defense

counsel, counsel's performance, sexual conduct, phone number, credibility

LexisNexis(R) Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
[HN1] A prior claim of ineffective assistance of counsel does not bar a subsequent claim regarding some other aspect of counsel's performance.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
[HN2] To establish a claim for ineffective assistance of counsel, the defendant must prove that counsel's performance fell below an objective standard of reasonable representation and that prejudice arises from counsel's performance. To show prejudice in this sense, the petitioner must demonstrate that there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

Civil Procedure > Judgments > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN3] As a postconviction relief proceeding is a collateral civil attack on a judgment, the judgment of the trial court is reviewed under the abuse of discretion standard.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
[HN4] Pertaining to a claim of ineffective assistance of counsel, Strickland, in providing guidance for the analysis of prejudicial effect, states: Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN5] Pertaining to a claim of ineffective assistance of counsel, regarding whether trial counsel's failure was prejudicial to the defense, the reviewing court must consider the totality of all the evidence before the judge or jury.

Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN6] Regarding a claim of ineffective assistance of counsel, to warrant reversal, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In analyzing the probability of a different outcome, it must be borne in mind that the outcome is determined by whether all the elements of the offense have been proved beyond a reasonable doubt. The analysis of the probability of a different outcome must be directed to that standard. In viewing the totality of the evidence before the jury, is the reviewing court confident that every element of the crime has been proven beyond a reasonable doubt? In contemplating the evidence before the jury in the context of this analysis, the reviewing court must consider that the errors have been corrected.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Appeals > Standards of Review > General Overview

[HN7] In evaluating an ineffective assistance of counsel claim, to have confidence in the verdict, the reviewing court must be able to conclude that substantial justice has been done.

COUNSEL: VICTOR V. VIGLUICCI, PORTAGE COUNTY PROSECUTOR, KELLI K. NORMAN, ASSISTANT PROSECUTOR, Ravenna, OH (For Plaintiff-Appellee).

ATTY. THOMAS A. CICCOLINI, Akron, OH (For Defendant-Appellant).

JUDGES: HON. DONALD R. FORD, P.J., HON. ROBERT A. NADER, J., HON. WILLIAM M. O'NEILL, J. FORD, P.J., NADER, J., concur.

OPINION BY: WILLIAM M. **O'NEILL**

OPINION

O'NEILL, J.

The cornerstone of our judicial system is the premise that no person shall be convicted of a crime until he or she has been afforded the opportunity to have a fair trial. For the reasons that follow, we find that Brian M. Brant was not afforded a fair trial. We express no opinion as to whether Brant is innocent or guilty.

Rape is a crime of violence which ultimately devastates the lives of at least two people. It is beyond question that emotional damage is suffered by the victim. The perpetrator, on the other hand, is labeled for life as a rapist and left to lead a life of rejection and scorn by society as a whole. It is a crime which generates strong passions in the minds of all who come in contact [*2] with the event. For these reasons, it is the duty of all courts to insure that justice is served for both parties.

Appellant, Brian M. Brant ("Brant"), appeals from the April 6, 1999 judgment of the Portage County Court of Common Pleas denying his motion for postconviction relief. On April 29, 1994, Brant was indicted on three counts of rape and one count of kidnapping, all counts being felonies of the first degree. The underlying incident occurred on April 1, 1994. After a jury trial, on October 7, 1994, Brant was convicted of all four offenses and sentenced to serve ten to twenty-five years on each of the rape charges, to run concurrently, and five to twenty-five years on the kidnapping charge, to be served consecutively. Brant's cumulative sentence is for fifteen to fifty years. He has been in prison since October 12, 1994. He was twenty-seven years old at the time of the alleged rape.

This is a case of what is commonly referred to as "date rape." The only witnesses to the alleged crime were Brant and the victim, Danielle Ondayko ("Ondayko"). On April 1, 1994, Ms. Ondayko was an eighteen-year-old freshman at the University of Akron. The incident occurred on a Thursday night. Ondayko [*3] had been studying in her dorm until after 11:30 p.m., when she left to meet some friends at a bar called Brewsky's at midnight. She drove to the bar and parked about one block away. Once in the bar, Ondayko could not find her friends, as they had left before she arrived.

Brant, whose first name is Brian, introduced himself to her as "Tim." Brant offered to buy her a drink. Brant testified she was drinking. She testified she was not, and that she drank water all night long. In fact, the nurse who observed her the following morning noted an odor of alcohol on her breath, and the blood sample taken at 9:00 a.m. indicated alcohol in her bloodstream. According to Brant, upon meeting, they talked for thirty to forty-five minutes.

Ondayko testified that at 2:15 a.m. she asked a bouncer if he could walk her to her car, and the bouncer said he could not. She said Brant then offered to escort her to her car and she accepted. But rather than walking to her car one block away, they got into his vehicle, which

was parked next to the bar. According to Ondayko, once in the car, Brant asked her if she would like to go to a sorority party, and she accepted the offer. According to Brant, before they [*4] left the bar, she had been asking if there were any after-hours parties they could go to after they left the bar, and that he had indicated there may be a party on a golf course near Kent, Ohio. They left for a party.

Brant drove to a golf course in Brimfield Township and pulled into a small gravel parking area. There were no other cars. The temperature was approximately 40 degrees. Ondayko had not worn a jacket because she did not want to have to carry it around the bar, where it was hot. She was wearing blue jeans and a white "body suit," which was a thin, long sleeved, tight fitting garment. There was no party in sight. Ondayko testified Brant told her the party was back on the golf course, and they had to walk to it. Brant testified she was anxious to go to a party and wanted to go looking for it. Brant took a blanket out of his car, and they walked onto the course. After walking on the course for a while and not seeing a party anywhere, either Brant or the both of them spread the blanket out to sit down. Ondayko testified that Brant insisted that they sit down for a while, whereas she did not want to sit. Once sitting, Brant began kissing her against her wishes. She asked him [*5] to stop, but he continued. She told him she wanted to go find the party, and "he looked at me and laughed, like scenically *(sic)* and he said, 'there is no party.'" Ondayko testified that was when she realized she was in trouble. She asked to be taken home, and he told her "in a little bit." Ondayko then testified as follows:

> A: "He started unbuckling my belt at this time, and, you know, I asked him what he was doing, and he said that he just wanted to make me feel good and he said that he loved me so much and he said that the first time he saw me he loved me.
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> "And I said, 'that's crazy, you don't even know me,' and he said, 'I just want to make you feel good,' and I said, 'I don't want to feel good if that's what it was,' and he unzipped my pants, and unbuttoned my bodysuit. I was pinned down and he took my underwear down.
>
> "He started -- he performed oral sex on me."

Ondayko testified that afterwards, Brant demanded she perform oral sex on him. When she began getting up to run, Brant "slammed" her back to the ground and told her if she wanted to get rough about it, he could get rough. She testified that she was shocked and scared for her life after she hit the ground. [*6] He then forced her to perform oral sex on him. After that, he then got on top of her and either attempted or simulated sexual intercourse. Ondayko testified that he told her it was not sexual intercourse. She testified she did not know, only that it was hurting very bad. At this point, Brant was apparently unable to maintain an erection. Ondayko testified she was crying through the entire process and continually saying "no." She testified his threats consisted of telling her she would not be going home until she did these things, and when he slammed her to the ground, she knew he was serious, and "wouldn't let up for nothing."

Afterwards, they got dressed and walked back to his vehicle. Ondayko testified she had to go with him because she had no idea where they were. Brant either asked Ondayko or forced her to drive the vehicle home. They drove back to her car. Ondayko testified that during the drive back to her car, he acted like he wanted to go out with her again, apologized, and asked her for her phone number. She gave him her phone number, and she asked him for his, hoping to get it to give to the police. He did not give her his phone number. Brant testified that after he got [*7] her number, she asked when he was going to call, and he told her he had a girlfriend. She became very upset, saying she had never done anything like this before and he had taken advantage of her. When they got to her car, Ondayko testified Brant acted as if nothing (bad) had happened, he opened her car door for her, and he kissed her goodnight. Brant testified he did not give her his number

or correct name because on a previous occasion he had cheated on his girlfriend and the person had told his girlfriend about it. He testified that the sexual activity was consensual and that she had even initiated some of the contact. Brant was ultimately identified because a police cruiser had driven by the golf course and the officer wrote down the license plate number of his car.

Ondayko got back to her dorm room at about 5:00 a.m. She woke up her roommate and told her she thought she had been raped. She called the rape crisis hotline and was directed to go immediately to the hospital, which she did. At the hospital, Ondayko was examined by Pediatric Nurse Practitioner, Donna Abbott ("Nurse Abbott"), who testified as the state's expert at trial. Nurse Abbott has training and experience in the [*8] area of sexual abuse and assault. Nurse Abbott took a specimen from the vagina. The specimen was DNA tested and matched Brant. One in ten thousand people would match the specimen. Nurse Abbott testified that the victim's labia, which covers the vagina, was discolored on one side, very red, and swollen. Inside, right beneath her vagina on the posterior fourchette, there was a "very minute tear." The tear was two to three millimeters long, one millimeter being approximately the size of a pinhead, or .04 inches.

At trial, on direct examination, Nurse Abbott testified these symptoms were consistent with force. On redirect examination she testified that in her opinion there *was* forced sexual intercourse. Nurse Abbott testified that normally an examiner cannot tell if a person has recently had sex, but that when it is forced there will be some tears visible, as she saw on Ms. Ondayko. Nurse Abbott also testified that Ondayko's hymen, which is the entrance to the vagina, was intact and had no tears. The medical report which was prepared stated the "vulva and labia had moderate erythema and edema, labia, i.e., vulvitis." Erythema means redness, edema means swelling, and vulvitis is general [*9] inflammation. Ms. Ondayko did not have any other bruises or markings on any other part of her body.

At trial, the state presented testimony from Ondayko; Nurse Abbott; Casey Rogers, who was an acquaintance of Brant's and danced with him at Brewsky's that evening; Linda Luke, who did the DNA testing; Ondayko's roommate; and two police officers.

The only person to testify for the defense was Brant himself. Brant denied he forced her to do anything, stated all the conduct was consensual, and that she had initiated some of the activity. Brant was convicted of all three counts of rape, one for cunnilingus, one for fellatio, and one for vaginal intercourse. He was also convicted of kidnapping.

Brant filed his notice of appeal on October 28, 1994. In *State v. Brant, 1995 Ohio App. LEXIS 4121* (Sept. 22, 1995), Portage App. No. 94-P-0117, unreported, this court affirmed the judgment of the trial court. However, this court's analysis of Brant's third and fourth assignments of error concluded that errors had occurred, but, due to defense counsel's failure to object, review of these errors was limited to plain error analysis. Under that standard of review, it was not apparent that, but for these errors, the outcome [*10] of the trial would clearly have been different.

Specifically, the third assignment of error related to the testimony of Casey Rogers. Ms. Rogers testified that she spoke with Brant on the phone the day the incident occurred. Brant met her at Brewsky's that night. Ms. Rogers testified that she danced with Brant, and that Brant repeatedly asked her to leave the bar with her, presumably to engage in sexual activity. She testified that upon a final refusal to leave the bar with him, Brant became upset, grabbed her shirt and shoved her. This was inadmissible and improper character evidence. The testimony was not relevant to prove whether

Brant intended to rape Ondayko. Nor was it relevant to prove plan or scheme, and thus was inadmissible "other acts" testimony, which, nevertheless, was heard by the jury without objection.

The fourth assignment of error related to the prosecution's closing argument. The prosecutor argued that had Ms. Rogers left the bar with Brant, she would have been the victim, or, in other words, argued that Rogers' testimony showed that Brant intended to rape *someone* that night. The prosecution also argued he was targeting blondes." As the underlying testimony [*11] was inadmissible, the argument was improper. However, since defense counsel failed to object to either the testimony or the argument, the error was subject only to plain error analysis. In light of the other evidence presented at trial, it was not apparent that, but for the prosecutor's improper argument, the jury would have reached a different conclusion.

In Brant's fifth assignment of error on direct appeal, he argued he was denied effective assistance of counsel. The basis for this argument was counsel's failure to make objections and arguments in relation to his first four assignments of error. We agreed that counsel's performance was deficient with respect to his failure to object to the testimony of Ms. Rogers, and the subsequent argument. We concluded this fell below the objective standard of reasonable performance. However, it was not evident that had counsel appropriately objected, there was a reasonable probability the result of the trial would have been different. Therefore, a reversal on the grounds of ineffective assistance of counsel was not warranted. The judgment of the trial court was affirmed. The Supreme Court of Ohio denied further review. *State v. Brant (1995), 74 Ohio St. 3d 1453, 656 N.E.2d 947*, [*12] and *State v. Brant (1996), 75 Ohio St. 3d 1404, 661 N.E.2d 754*.

On September 17, 1996, Brant filed a petition for postconviction relief, asserting he was denied effective assistance of trial counsel and arguing grounds other than those asserted in the direct appeal. [HN1] A prior claim of ineffective assistance of counsel does not bar a subsequent claim regarding some other aspect of counsel's performance. *State v. Belden, 1991 Ohio App. LEXIS 869*, *5 (Mar. 1, 1991), Trumbull App. No. 90-T-4431, unreported. Also, the grounds raised in the petition existed *dehors* the original trial record. As such, they could not have been raised in the direct appeal and were properly before the court in postconviction relief proceedings. *State v. Hester (1976), 45 Ohio St. 2d 71, 341 N.E.2d 304*. One of the issues raised in the petition was defense counsel's failure to call an expert witness to rebut the testimony of Nurse Abbott that her examination revealed Ondayko was the victim of forced sexual penetration.

With his petition, Brant submitted an affidavit of Dr. Gayleen P. Kolaczewski. Dr. Kolaczewski stated that Brant contacted her prior to the trial and provided her with the victim's [*13] emergency room and sexual abuse records. After reviewing the records, the doctor was prepared to testify that the ambiguous signs of trauma to the victim's genitalia, combined with other observations noted in the reports, led her to the conclusion that the victim was not subjected to forced vaginal penetration. Dr. Kolaczewski stated that the redness and swelling around the outer portion of the victim's vagina could be the result of a number of innocuous causes, including simply wearing clothing that was too tight. Dr. Kolaczewski was informed by Brant of the dates she would be needed to testify. She cleared her schedule of appointments for those two days, but defense counsel, who was aware of her availability, never contacted her or called her to testify.

On February 7, 1997, the trial court dismissed the petition without conducting an evidentiary hearing. Citing *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373*, the judgment

entry stated "trial counsel's failure to conduct pre-trial investigation did not give rise to a presumption of prejudice and ineffective assistance of counsel because Defendant's attorney *** did not completely fail to undertake a pre-trial [*14] investigation and did present a reasonable defense strategy."

In *State v. Brant, 1998 Ohio App. LEXIS 1637* (Apr. 17, 1998), Portage App. No. 97-P-0019, unreported, this court reversed the trial court's judgment, stating:

> "Since the postconviction relief petition must clearly allege a factual situation that, if proved at a hearing, would entitle the petitioner to relief, a petition asserting trial counsel's failure to call a witness must demonstrate how the uncalled witness' testimony would have benefited the defense. A marginal benefit is not sufficient because, under *Strickland*, the petitioner must demonstrate there is a reasonable probability the outcome of the trial would have been different. Accordingly, the uncalled witness must have been central to the defense, and it must appear reasonably probable that the defendant would not have been convicted had the witness been called.
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> "After reviewing the petition and the supporting materials, we have concluded that Brant has demonstrated substantive grounds for relief, under *R.C. 2953.21(C)*, by showing the testimony of Dr. Kolaczewski was critical to his defense. Had she been called, it is arguable there is a reasonable [*15] probability Brant would not have been convicted." *1998 Ohio App. LEXIS 1637* at *13-14.

This court also noted that, while the doctrine of *res judicata* prevented revisiting the issues raised in the direct appeal, in light of counsel's failure to call an available expert witness to rebut the state's expert, the errors addressed therein were more prejudicial than they appeared at that time. The prejudice of those errors was measured against the strength of the remaining evidence and testimony, a key part of which went unrebutted. The cumulative effect of counsel's failure to call an expert witness to impeach the opinion testimony of Nurse Abbott combined with the other errors "severely undermined" our confidence in the verdict. *1998 Ohio App. LEXIS 1637* at *16. On April 20, 1998, the case was remanded for a hearing to fully investigate the merits of Brant's ineffective assistance of counsel claim.

On December 4, 1998, the trial court conducted the postconviction relief hearing. Brant, Dr. Kolaczewski, and Brant's trial counsel, George Keith ("Keith") testified. Brant testified that Keith told him they would need an expert witness to rebut the State's expert on the issue of forced penetration. Brant's mother worked [*16] in a doctor's office, and Brant volunteered that he may be able to provide the expert. Brant then took copies of the reports and met with Dr. Kolaczewski. Dr. Kolaczewski reviewed the reports. Brant gave Keith her phone number, and Dr. Kolaczewski made herself available by canceling all other appointments on the two days she anticipated being called to testify.

Dr. Kolaczewski testified that the symptoms indicated in the medical reports with regard to Ms. Ondayko's genital area are not uncommon, and that, in fact, she sees similar symptoms in the regular check-ups of her patients "all the time." She stated the symptoms could be caused by tight clothing, pantyhose, poor hygiene, sitting on a bicycle seat, sitting on a hard surface for a long time, or excess moisture. She testified that the laceration indicated was a "superficial" laceration, meaning very much on the surface, and it was located on the external genitalia. She testified this could be caused by a fingernail, clothing rubbing against it, inserting a "tampax" or pad, or a number of other things. She stated this is seen in normal and abnormal exams. She testified in her opinion she did not think the lesion was abnormal. She [*17] also noted the report stated the hymen was still intact, which is usually the case in virgins. She noted the absence in the report of any indications of bruising or scratching between the thighs, and also the absence of bruising or trauma anywhere else on the victim's body, which would be consistent with force. She concluded that, in her opinion, Ms. Ondayko was not subjected to forced sexual penetration.

Attorney Keith testified he was aware of Dr. Kolaczewski's availability before the trial began. However, in his evaluation of the case, he concluded the issue at trial was not going to be whether an act of intercourse occurred, but that the issue was going to be whether it was a consensual act. Keith concluded that the testimony of Nurse Abbott would not present an issue that would "concern the jury," as Brant was going to admit intercourse occurred. Therefore, he opted not to call an expert witness and instead determined to rely on cross-examination of Nurse Abbott.

On April 6, 1999, the trial court entered judgment denying Brant's petition for postconviction relief. The court only addressed the potential testimony of Dr. Kolaczewski, and not any of the other issues raised in the [*18] petition. Brant's attorney did not submit any evidence on these other issues at the hearing. The court concluded there was not a reasonable probability the jury would not have convicted Brant had the testimony of the doctor been heard. The court reasoned that the jury found there was force connected with all of the sexual conduct that night, and that conclusion was in the jury's sole province to make. The court found there was ample evidence to support that finding. The court concluded that the doctor's testimony did not impeach Ondayko's testimony that, whether or not there was vaginal penetration, that it hurt "real bad." The court noted that semen was found in the victim's vagina that matched the defendant's. The court noted that Dr. Kolaczewski did not testify that she knew the legal standard for vaginal intercourse, *i.e.* that penetration, however slight, is sufficient to constitute vaginal intercourse. In fact, neither party ever asked the doctor what the legal standard was, rather, the questioning was directed at her analysis of the symptoms as they related to the issue of force. Finally, the court reasoned that Nurse Abbott had greater training in the area of sexual abuse, [*19] and had the benefit of directly examining Ondayko after the incident, as opposed to simply reviewing the medical records. Based upon those reasons, the court denied the petition. From this judgment, Brant timely filed notice of appeal, assigning the following error:

> "The trial court erred and violated the appellant's constitutional rights in denying his motion for postconviction relief because appellant stated a prima facie case of ineffective assistance of counsel and is therefore entitled to a new trial."

[HN2] To establish a claim for ineffective assistance of counsel, the defendant must prove that counsel's performance fell below an objective standard of reasonable representation and that prejudice arises from counsel's performance. *Bradley, supra,* at paragraph two of syllabus. To show prejudice in this sense, the petitioner must demonstrate that there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Id.,* paragraph three of syllabus; *State v. Brant, 1998 Ohio App. LEXIS 1637*, *11 (Apr. 17, 1998), Portage App. No. 97-P-0019, unreported, citing *Strickland v Washington* (1984). *466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052*. [*20] [HN3] As a postconviction relief proceeding is a collateral civil attack on a judgment, the judgment of the trial court is reviewed under the abuse of discretion standard. *State v. Apanovitch (1995), 107 Ohio App. 3d 82, 87, 667 N.E.2d 1041*.

Brant has presented five issues for review within his assignment of error. As the resolution of the fifth issue, which addresses the trial court's conclusion that there was not a reasonable probability the outcome of the trial would have been different had Dr. Kolaczewski testified, is dispositive of this appeal, we shall address that first.

Initially, we must note that in its brief the state cites *State v. Nicholas (1993), 66 Ohio St. 3d 431, 436, 613 N.E.2d 225*, citing *State v. Thompson (1987), 33 Ohio St. 3d 1, 10-11, 514*

N.E.2d 407, for the proposition that the failure of defense counsel to call an expert witness and instead to rely on cross-examination of the state's expert does not constitute ineffective assistance of counsel. In *Thompson,* the court concluded it did not constitute ineffective assistance because under the circumstances of that case the court determined "the errors alleged by [*21] appellant were neither so serious that his counsel were not functioning as the 'counsel' guaranteed by the Sixth Amendment, nor so serious that the result of his trial Was rendered unreliable." *Id. at 11*. The conclusions in *Nicholas* and *Thompson* were based on the facts and circumstances of those cases, and the cases did not set forth a rule of universal application (syllabus law), although they clearly would ratify a like conclusion in a like case. This court must still apply the *Bradley* analysis to the facts and circumstances of this case and determine if failure to call an expert in this case was prejudicial to the defense. Likewise, by no means should this court's opinion in this case be cited for a general proposition that failure to call an expert is *per se* ineffective assistance of counsel. Our conclusion in this case is supported by the facts of this case.

Attorney Keith's analysis concluding that the key issue of this case was consent is correct. Given that the DNA proved sexual conduct occurred, and also that Brant intended to testify they had sexual relations, consent was the only issue. However, his analysis with regard to the testimony [*22] of Nurse Abbott was incorrect, Keith testified he did not believe Nurse Abbott's testimony would "concern the jury," because he apparently believed her testimony would merely establish something which Brant intended to freely admit, that sexual conduct occurred. This analysis totally overlooks the fact that Nurse Abbott's testimony was being offered not so much to establish conduct which occurred, but to establish the nature of that conduct. The most critical part of Nurse Abbott's testimony was her informing the jury that in her opinion as an expert, the physical evidence establishes that there was forced penetration. Forced penetration is inconsistent with consent. Due to defense counsel's misunderstanding of the import of Nurse Abbott's testimony, his performance was flawed.

In the context of this trial, the single, clear, and only implication of the use of the term force was that it was the abrogation of consent. The use of both terms was directed solely at the issue of whether the sexual conduct that occurred was consistent with the will and wishes of Ms. Ondayko. The only witnesses whose testimony was relevant to the issue of consent were Ondayko, Brant, and Nurse Abbott. As [*23] between Ondayko and Brant, the word of Ondayko was backed up by an expert whose status as an expert lends her testimony special credibility with a jury. The critical nature of Nurse Abbott's testimony, as it related to the outcome of this trial, is enhanced by the fact that the injuries or condition of Ondayko's genital region were not at all severe, rather, they were slight to the point that the causation was debatable. Consequently, we must conclude that it is not debatable that counsel should have called an available expert who would have testified that the physical evidence does not indicate forced sexual penetration. We can conceive of no reasonable strategy that neglects to utilize this asset.

The state argues that the physical evidence related to forced sexual penetration is largely irrelevant because Brant was convicted of the two other forms of rape, which, sequentially, occurred first. Those crimes would not involve any injury to Ondayko's genitalia. However, the three crimes were tried together. The key issue was consent. [HN4] In *Strickland, supra*, the court, in providing guidance for the analysis of prejudicial effect, stated:

> *"Some errors will have had a pervasive* [*24] *effect on the inferences to be drawn from the evidence,* altering the entire evidentiary picture, and

> some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (Emphasis added.) *466 U.S. at 695*.

The expert testimony corroborating forced penetration lent great credibility to Ondayko's version of events, which otherwise had some credibility gaps. It was the only "objective" testimony supporting one person's word over the other's. Consent, in this case, could be considered an all or nothing proposition. One party testified all the conduct was consensual, and the other party testified none of it was consensual. The versions are mutually exclusive. Facts tending to prove a lack of consent to one act were consequently probative of the issue on the other acts. Thus, physical evidence tending to establish the use of force in one of the acts was not irrelevant to determination of the issue with respect to the other acts.

The failure of counsel to call an available expert witness in rebuttal fell below an objective standard of reasonable [*25] representation. The remaining issue is whether the [HN5] failure was prejudicial to the defense. In this analysis, the court must consider the totality of all the evidence before the judge or jury. *Bradley, supra, at 142*, citing *Strickland.* We must conclude that counsel's errors were prejudicial.

[HN6] "To warrant reversal, 'the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Bradley, supra at 142*, quoting *Strickland, supra* at 694. This court has no opinion regarding Brant's guilt or innocence. In analyzing the probability of a different outcome, it must be borne in mind that the outcome is determined by whether all the elements of the offense have been proved beyond a reasonable doubt. The analysis of the probability of a different outcome must be directed to that standard.

Bradley, in adopting the *Strickland* analysis, has defined a reasonable probability as a probability sufficient to undermine confidence in the outcome. In other words, [*26] in viewing the totality of the evidence before the jury, are we confident that every element of the crime has been proven beyond a reasonable doubt? In contemplating the evidence before the jury in the context of this analysis, we must consider that the errors have been corrected.

The state presented two witnesses whose testimony was related to the key issue of consent, Ms. Ondayko and Nurse Abbott. In the final analysis, this case boiled down to the word of Ondayko versus that of Brant. In the trial, Ondayko's word was supported by the testimony and conclusion drawn by Nurse Abbott, whose status as an expert lent it special credibility. In evaluating the probability of a different outcome, we must consider that this testimony has been countered by the testimony of a defense expert. The state has the burden of proving guilt beyond a reasonable doubt. The testimony of a defense expert addressing the physical evidence and concluding it indicated an absence of force may go a long way towards raising that doubt. We conclude that if Brant had presented a medical expert at trial there is a reasonable probability the trial would have resulted in a different outcome.

The confidence we hold [*27] in the outcomes of trials in our criminal justice system is predicated upon the fairness of the process. When we can look at the process and conclude it was fair, then we can likewise conclude that substantial justice has been done. If the process was fundamentally flawed, then we cannot have confidence in the outcome, and we cannot conclude that substantial justice has been done. [HN7] In evaluating an ineffective assistance of counsel claim, to have confidence in the verdict, we must be able to conclude that

substantial justice has been done. In this case, we cannot reach that conclusion.

We reverse the judgment of the trial court and remand the matter for a new trial. The defense may call Dr. Kolaczewski or another expert of their choice, subject to the Ohio Rules of Evidence.

Consistent with this opinion, it is the finding of this court that because of a certain expression made by the trial judge during the course of these proceedings, we suggest that another judge be assigned to this matter.

JUDGE WILLIAM M. O'NEILL

FORD, P.J.,

NADER, J.,

concur.

STATE OF OHIO, Plaintiff-Appellee, - vs - MICHAEL K. LOVE, Defendant-Appellant.

CASE NO. 99-L-051

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

2001 Ohio App. LEXIS 2147

May 11, 2001, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas. Case No. 98 CR 000458.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: A judgment of the Lake County Court of Common Pleas (Ohio) convicted defendant, after a jury trial of murder, and sentenced defendant to a 15-years-to-life term of incarceration and three years for a gun specification. Defendant appealed.

OVERVIEW: Defendant was involved in an altercation with the victim and others. No witness testified that anyone in the area other than defendant had a gun pointed at the victim at the time. After the incident defendant left the state with his rap music group. The appeals court determined that defendant was not denied effective assistance of counsel, his right to a fair trial, and due process of law. Defendant failed both Strickland prongs: to show prejudice and deficient performance. Defendant did not show prejudice by potential eyewitnesses not being subpoenaed as witnesses by his attorney, based upon their statements contained in police reports, since no other evidence supported any other person at the scene with a gun. Defendant's attorney was not required to put self-defense words in defendant's mouth. The introduction of defendant's rap music involvement was not shown to prejudice defendant. The flight instruction was proper. The jury had to decide whether defendant fled, and, if so, how flight bore on the issues of guilt or innocence.

OUTCOME: The appeals court affirmed the judgment.

CORE TERMS: gun, assistance of counsel, self-defense, assignment of error, defense strategy, subpoena, guilt, ineffective, shot, rap, arm, fair trial, flight, fled, police report, involvement, music, deficient, shooting, murder, defense counsel, hearsay exception, violence, shooter, tussle, weapon, dirty, fired, scene, evidence presented

LexisNexis(R) Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Defenses > Self-Defense
[HN1] To warrant reversal on the grounds that he was not provided the effective assistance of counsel, a criminal defendant bears the burden to meet the two-pronged test set forth in Strickland, which requires a showing of both deficient performance and prejudice.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN2] The second prong of Strickland requires a showing that counsel's errors were so serious as to deprive the appellant of a fair trial whose result is reliable. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. A reviewing court, in analyzing an ineffectiveness claim, must view the evidence presented to the jury in toto.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Defenses > Self-Defense
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense
[HN3] Appellant cannot assert inadequate assistance of counsel due to his own testimony. An attorney's job is not to put words into a witness's mouth, but to elicit truthful testimony.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Escape > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > General Overview
Torts > Intentional Torts > False Arrest > General Overview
[HN4] It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.

COUNSEL: CHARLES E. COULSON, LAKE COUNTY PROSECUTOR, BRIAN L. SUMMERS, VINCENT A. CULOTTA, ASSISTANT PROSECUTORS, Painesville, OH, (For Plaintiff-Appellee).

ATTY. MARK E. SULLIVAN, Cleveland, OH, (For Defendant-Appellant).

JUDGES: HON. DONALD R. FORD, P.J., HON. WILLIAM M. O'NEILL, J., HON. JOHN R. MILLIGAN, J., Ret., Fifth Appellate District, sitting by assignment. JOHN R. MILLIGAN, Ret., Fifth Appellate District, sitting by assignment. FORD, P.J., concurs, O'NEILL, J., dissents with dissenting opinion.

OPINION BY: JOHN R. MILLIGAN

OPINION

MILLIGAN, J., Ret.

On September 25, 1998, appellant, Michael K. Love, was indicted by the Lake County Grand Jury for two counts of murder, in violation of *R.C. 2903.02(A)* & *(B)*, with a gun specification. The indictment alleged that, on or about August 23, 1998, appellant purposely caused the death of Kenneth Johnson by shooting him with a firearm. The case came before the Lake County Court of Common Pleas for a jury trial commencing on February 22, 1999. At trial, the evidence showed that:

On August 22, 1998, appellant [*2] was at a bar named either Hellbusters or Hellraisers in Fairport Harbor, Ohio. Appellant, who is from Cleveland, Ohio, was at the bar as part of a promotional appearance for his rap music group, named Aftamaff. The bar was managed by one of his acquaintances from Cleveland, named Delmarcus Anderson (aka "Peanut"). Also at the bar were the other members of the group and several people he knew from his neighborhood in Cleveland. When he left the bar at closing time, about 2 a.m., appellant got into a car driven by John Turner, one of his friends from Cleveland. John Turner followed at least two other cars toward an after-hours party in Painesville. One car contained Marcus Perkins (aka "Boss"), Tomarve Smith, and Delmarcus Anderson. The other car contained Damon Anderson (aka "Long"), Richard Hayden (aka "Snoop"), Keith Bowles (aka "K.B."), and Jamal Russell (aka "Dred").

As they passed a bar, named Nino's, in Painesville, one of the members of the lead car recognized a person he knew, a man identified only as "Choc," talking to police officers in front of Nino's. Also with "Choc" were Michael Mann and a man identified only as "Squeak" or "Squirrel." The lead car turned around the [*3] three at Nino's told them that they had been "jumped" by a group of men from Painesville, including Kenneth Johnson (aka "Dirty") and Antonio Rimmer (aka "Stickman"). They went to an apartment complex in Painesville, known as the Argonne Arms, where the attackers lived. Appellant's car followed.

When appellant and John Turner entered the Argonne Arms complex, they saw "Boss," Marcus Perkins, being chased by a man carrying what looked like a sawed-off shotgun. The man with the gun turned out to be the eventual victim, Kenneth Johnson. Perkins was able to evade Johnson and was picked up by John Turner. At this point, they were attempting to leave the complex when they saw Damon Anderson and Richard Hayden kicking and stomping on a man that was lying on the ground. The man was Ollie Gipson, who later died from his injuries. Damon Anderson got back into the car and Richard Hayden continued to stomp on Ollie Gipson's head. John Turner pulled his car behind the other men's car and they saw Kenneth Johnson running towards Richard Hayden with a gun. Richard Hayden was able to knock Johnson's gun to the ground and the two began to tussle. Keith Bowles testified that he picked up the gun. The [*4] passengers of John Turner's car got out of the car, but ducked behind the open doors. John Turner and appellant testified that Johnson pointed the gun at their car, but did not fire. All of the witnesses testified that they heard many shots fired during the events.

John Turner testified that he saw appellant run out of the car and heard shots. He did not see appellant fire a gun, but testified that appellant got back into the car and said to go. Damon Anderson testified that he saw appellant run up to where Johnson and Hayden were scuffling and raise his arm, then he heard a pow, saw a small flash, and saw Johnson stop tussling. Appellant testified that he was very scared during the tussle and found a gun, a .380 left in Turner's car by appellant's brother. He testified that there were lots of shots being fired and lots of confusion surrounding the tussle. He testified that he was holding the gun, but did not point it and that it just went off. According to appellant, he did not realize that he had hit anybody. He testified that: "I'm

not saying that I didn't fire it, I'm saying I find it very hard to believe that I killed somebody." He testified that he didn't intentionally fire [*5] the gun, but just "clutched up." When cross-examined about whether he fired the gun in self-defense, he answered "no, I was acting in fear."

The bullet entered Kenneth Johnson's left side and exited his left; it was never found. The bullet punctured his liver and severed his superior mesentery artery, which caused him to bleed to death.

As they were leaving the scuffle, Keith Bowles threw Johnson's gun in the trash and appellant threw his brother's gun in the trash. By that time, there were police at the scene. They briefly detained both cars, but let them leave. They all went back to the "keyhole," the dead end of East 117th street in their Cleveland neighborhood. There, appellant told many people that his gun "popped," but he did not know if he hit anybody.

Shortly after the shooting, appellant left the state to tour with his rap group. Damon Anderson retained an attorney and contacted the police to tell of his involvement with the deaths. The police wished to speak to appellant about his involvement, but he was out of state. Appellant learned that his name was "dirty" on the streets, meaning the police were looking for him. He was indicted by the Grand Jury while he was out of [*6] the state. He returned and testified that he attempted to contact the police. On October 16, 1999, the police apprehended him after executing an arrest warrant at his girlfriend's house.

On February 25, 1999, the jury found appellant guilty. The trial court sentenced appellant to a fifteen years to life term of incarceration and three years for the gun specification. Appellant assigns the following errors:

"[1.] Defendant was denied effective assistance of counsel.

"[2.] Defendant was denied his right to a fair trial and his right to due process of law when the prosecutor's misconduct prejudiced the defense.

"[3.] Defendant was denied a fair trial by the abuse of the court's discretion when the court instructed the jury on the issue of 'flight.'"

In his first assignment of error, appellant asserts that he was denied effective assistance of counsel because his attorney failed to subpoena certain witnesses, did not properly prepare appellant to testify as to self-defense, and failed to effectively present a self-defense case. [HN1] To warrant reversal on the grounds that he was not provided the effective assistance of counsel, appellant bears the burden to meet the two-pronged test [*7] set forth in *Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, which requires a showing of both deficient performance and prejudice.

Appellant's argument fails because he fails to meet the prejudice prong of the *Strickland* test. [HN2] The second prong requires a showing that counsel's errors were so serious as to deprive the appellant of a fair trial whose result is reliable. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373*, paragraph three of the syllabus. A reviewing court, in analyzing an ineffectiveness claim, must view the evidence presented to the jury in toto. *Id. at 142, 538 N.E.2d at 379-380*, citing *Strickland*.

Appellant first asserts that his trial counsel was inadequate for her failure to subpoena or call any of six different witnesses. At the end of the trial, she did proffer to the court statements by these

potential witnesses from a police [*8] report that she argued should have been admitted under the "excited utterance" hearsay exception. Appellant argues that his counsel should have subpoenaed these witnesses and had them testify, rather than attempting to rely on the inadmissible police report.

Appellant is correct that his attorney should have subpoenaed these witnesses in order to have the testimony admitted. However, the failure to have the testimony admitted does not appear prejudicial to appellant. The police reports in question refer to questioning done at the emergency room by Painesville Police officers of friends and relatives of the victims. One woman stated that she saw four to six black males fighting and that Kenneth Johnson was fighting a black male. She had not seen Lisa Dunlap's car, the car in which appellant was riding. Kenneth Johnson's cousin stated that she saw someone holding what she thought was an assault rifle, not a .380 caliber gun. Another witness stated that she heard shots and saw a man she knew as Peanut and heard him say "I'm shooting you, you die next, I know where you live" as he drove past. Another witness flagged down police and told them that a feud had been going on between the [*9] men from Painesville and the men from Cleveland over a woman and that Peanut stated "I am going to kill that Dirty [Kenneth Johnson]."

While the above statements would tend to prove that Peanut or someone else may have committed the murder, nothing from the trial supports the statements. Nobody, not even appellant, testified that Peanut was at the scene with a gun. None of appellant's or the state's witnesses testified that anyone in the area besides appellant had a gun pointed at Kenneth Johnson at the time he was shot.

Appellant also asserts that his attorney failed to properly prepare to present a self-defense argument because she had not properly instructed appellant about how to testify and because she did not understand the concept of self-defense. [HN3] Appellant cannot assert inadequate assistance of counsel due to his own testimony. An attorney's job is not to put words into a witness's mouth, but to elicit truthful testimony. Furthermore, appellant points to an example where the trial court admonished counsel for improperly asking a question by "telegraphing" to appellant what his answer should be. Neither of these are examples of why appellant's counsel was deficient. Appellant's [*10] first assignment of error is without merit.

In his second assignment of error, appellant asserts that the trial court erred by allowing the prosecution to introduce testimony regarding appellant's involvement in a rap music group. He argues that this information caused prejudice towards him because rap music is often associated with violence and gangs and that the state had agreed not to introduce such evidence. The trial court determined that the agreement with the state was moot because appellant referred to his status as an entertainer in his opening statement. Whether or not the state and appellant had such an agreement is irrelevant. We cannot say that reference to appellant's involvement was unduly prejudicial. No mention was made of any violence in appellant's songs or violence associated with rap music in general. Appellant's second assignment of error is without merit.

In his third assignment of error, appellant asserts that the trial court erred by giving an instruction about flight. Appellant disputes the following instruction given by the trial court:

"Now in this case, ladies and gentlemen, there has been evidence presented that the defendant, Michael K. Love, fled [*11] from Argonne Arms and then left the State of Ohio. In regard to this evidence you are instructed that flight in and of itself does not rise or raise a presumption of guilt but it may tend to show consciousness of guilt or a guilty connection with the crime.

"If, therefore, you find that the defendant did flee from the Argonne Arms and then left the state you may consider the circumstances in determining guilt or innocence of the defendant. Upon you alone rests the decision to determine what weight, if any you place upon the evidence you find, if any which bears upon the issue."

[HN4] "It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." *State v. Williams (1997), 79 Ohio St. 3d 1, 11, 679 N.E.2d 646*. Appellant argues that there was no evidence that he fled from justice to support the giving of such an instruction. The trial did not state that appellant had fled. It merely stated that there was evidence that appellant had fled, but left it up to the jury to decide whether [*12] he had or not. The instruction was not improper. Appellant's third assignment of error is without merit.

JUDGE JOHN R. MILLIGAN, Ret.,

Fifth Appellate District,

sitting by assignment

FORD, P.J., concurs,

O'NEILL, J., dissents with dissenting opinion.

DISSENT BY: WILLIAM M. **O'NEILL**

DISSENT

DISSENTING OPINION

O'NEILL, J.

For the following reasons, I must respectfully dissent.

In order to affirm a conviction when appellant is raising the issue of ineffective assistance of counsel, this court must, by definition, find that there was effective assistance of counsel. To accomplish that task, this court must go further than merely identifying a strategy adopted by trial counsel. There must be a finding by this court that some defense strategy, however tenuous, was tried and rejected by the jury. It is not sufficient for this court to defer totally to the strategies of defense counsel and remain satisfied that the defendant got a fair trial. Stated more succinctly, before an appellate court may defer to a defense strategy, one must be identified and ratified. In the instant matter, I found none. Simply having a defendant take the stand and deny culpability [*13] is not sufficient to escape the label of "ineffective assistance of counsel." This was a murder case, and the stakes remain high.

Two logical, but poorly executed, defense strategies existed in this case. On one hand, defendant could have built upon the concept that there was a lot of confusion and a lot of potential shooters, with weapons and motives, at the scene. Such a reasonable defense strategy could readily lay the foundation for attacking the state's evidence on a "beyond a reasonable doubt" basis. If defense counsel was, in fact, working on developing the "confusion/multiple shooter" theory, there is no possible justification for the failure to subpoena the emergency room witnesses. They all identified "other" potential shooters, motives, and weapons. Clearly, counsel's attempt to admit the testimony

through the police reports, on a hearsay exception theory, demonstrates her belief the testimony had probative value. Yet accepting that analysis as credible leads to the inescapable conclusion that the failure to properly present this testimony to the jury can only be charitably labeled as inept. Ineffective is another description. This failure standing alone demonstrates ineffective [*14] assistance of counsel and is grounds for a new trial.

You simply cannot ignore your duty to subpoena relevant witnesses to trial and then attempt to retrieve their testimony through complicated legal maneuvering. If the witnesses' testimony was important, they should have been on the stand giving sworn testimony. There is no legal strategy to support the failure to perfect a subpoena and then attempt to resurrect the testimony through a hearsay exception.

On the other hand, the defense strategy may have been predicated on the legally justifiable concept of self-defense. Under the factual circumstances presented here, self-defense may have been viable. The defendant's testimony on the subject, however, fell far short of what was needed to establish the defense. The majority states that "appellant cannot assert inadequate assistance of counsel due to his own testimony." I respectfully disagree. In his testimony, appellant testified that he was "acting in fear" which clearly is ONE OF THE ELEMENTS of self-defense. However, the testimony as presented was only elicited on cross-examination, and thus, it was clear that defense counsel either had not considered the defense, or at a minimum, [*15] had not prepared the witness in anticipation of testifying to the elements required to prove the defense. If it was a good defense strategy, it was not effectively utilized. The defendant never denied firing a weapon during this gang-related fracas. And the evidence was unequivocal that he was in the middle of a very dangerous situation. At the court of appeals level, it is not readily apparent what the theory of defense was, and if it included self-defense. That is clearly ineffective assistance of counsel.
JUDGE WILLIAM M. O'NEILL

STATE OF OHIO, Plaintiff-Appellee, - vs - MARK VANDERGRIFF, Defendant-Appellant.

CASE NO. 99-A-0075

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, ASHTABULA COUNTY

2001 Ohio 4327*; *2001 Ohio App. LEXIS 4285

September 21, 2001, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas Case No. 99 CR 66.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Charges were filed after defendant had a physical altercation with his 12-year-old stepdaughter. The Ashtabula County Court of Common Pleas (Ohio), following a jury trial, convicted defendant of domestic violence, in violation of *Ohio Rev. Code Ann. § 2919.25(A)*, a fifth degree felony. Defendant appealed.

OVERVIEW: Among other things, defendant hit the victim solidly in the arm, slammed her into a wall, grabbed her by the hair, and flung her toward the stairs. The appellate court held that defendant was denied the effective assistance of counsel. Defendant presented some evidence that the child was a discipline problem, that he was permitted by the child's mother to discipline her when appropriate, and that the child acted in a manner that cried out for some discipline. Thus, having met the burden of production for a defense of proper and reasonable parental discipline, defendant was entitled to a jury instruction on the issue. Defense counsel did not ask for one and, thereby, committed an error, falling below an objective standard of reasonable representation. Having argued the defense in his closing, counsel essentially admitted to the elements of the offense as the offense was presented to the jury in the jury instruction. Under the circumstances, the jury could reach but one conclusion, guilty as charged. Accordingly, confidence in the outcome of the trial had been sufficiently undermined to warrant reversal.

OUTCOME: The judgment of the trial court was reversed and remanded.

CORE TERMS: discipline, parental, domestic violence, affirmative defense, defense counsel's, assistance of counsel, hit, jury instruction, reasonable probability, assignments of error, physical harm, cross-examination, disciplining, deficient, prong, listen, counsel's performance, burden of production, trier of fact, stepfather, objective standard, ineffective, daughter, yelling, times, closing arguments, sufficient evidence, burden of proof, preponderance, stepdaughter

LexisNexis(R) Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN1] To establish a claim for ineffective assistance of counsel, the defendant must prove that counsel's performance fell below an objective standard of reasonable representation and that prejudice arises from counsel's performance.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN2] The first prong of the test for ineffective assistance of counsel requires a showing that counsel's performance fell below an objective standard of reasonable representation. In order to

determine whether an attorney's performance was deficient, the trial court must inquire whether the attorney provided reasonably effective assistance, considering all of the circumstances.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN3] For an ineffective assistance of counsel challenge, a properly licensed attorney is presumed to be competent and, thus, judicial scrutiny of his or her performance must be highly deferential. An attorney's strategic decisions and trial tactics will not support a claim of ineffective assistance of counsel.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN4] To demonstrate the prejudice prong of the test for ineffective assistance of counsel, the defendant must demonstrate that there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Family Law > Family Protection & Welfare > Children > General Overview
[HN5] The Supreme Court of Ohio has stated that there is "nothing" in *Ohio Rev. Code Ann. § 2919.25(A)* that prevents a parent from properly disciplining his or her child. The conclusion was established by an evaluation of the element of "physical harm." Harm, in part, is defined as an injury. Injury is defined as the invasion of any legally protected interest of another. A child does not have any legally protected interest which is invaded by proper and reasonable parental discipline.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Domestic Offenses > General Overview
Criminal Law & Procedure > Defenses > Justification
[HN6] In domestic violence cases where the victim is a child, appellate courts have recognized the affirmative defense of "proper and reasonable parental discipline" of the child.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense
Criminal Law & Procedure > Defenses > Justification
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN7] *Ohio Rev. Code Ann. § 2901.05(C)(2)* defines a non-statutory affirmative defense as a defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence. *Ohio Rev. Code Ann. § 2901.05(A)* states that the burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, is upon the accused. This standard applies to the parental discipline defense in domestic violence cases.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Domestic Offenses > General Overview
Criminal Law & Procedure > Defenses > Justification
[HN8] Although the parental discipline defense in domestic violence cases is an affirmative defense, the issue need not be raised prior to trial under *Ohio R. Crim. P. 12*. As the defense presents a question of fact, it is only capable of resolution by trial on the general issue.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

[HN9] The burden of proof encompasses two concepts, the burden of production and the burden of persuasion. The burden of production requires a party to come forward with, or to produce, sufficient evidence to make out a prima facie case of the defense. This evidence may come from any source. "Any" source would include testimonial evidence, and testimony adduced on cross-examination is no less "evidence" than is testimony adduced on direct examination. Therefore, it is possible that a party could meet its burden of production on an issue without presenting its own witnesses to testify on the issue, and, consequently, a trial court should not require that a defendant testify in order to assert this defense.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Domestic Offenses > General Overview

[HN10] The propriety and reasonableness of corporal punishment in each case must be judged in light of the totality of the circumstances.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

[HN11] When a defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable jurors as to the existence of the affirmative defense, the defendant has met his burden of production on that issue.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Domestic Offenses > General Overview

Criminal Law & Procedure > Defenses > Justification

[HN12] Once a defendant has presented evidence on the defense of parental discipline, the trier of fact must weigh whether the actions constituted proper and reasonable discipline, or whether they constituted an injury within the meaning set forth in Suchomski.

COUNSEL: THOMAS L. SARTINI, ASHTABULA COUNTY PROSECUTOR, CAROL G. GRASGREEN, ASSISTANT PROSECUTOR, Jefferson, OH (For Plaintiff-Appellee).

ATTY. PAUL J. MOONEY, Chardon, OH (For Defendant-Appellant).

JUDGES: HON. WILLIAM M. O'NEILL, P.J., HON. JUDITH A. CHRISTLEY, J., HON. ROBERT A. NADER, J. CHRISTLEY, J., dissents with Dissenting Opinion, NADER, J., concurs.

OPINION BY: WILLIAM M. **O'NEILL**

OPINION

O'NEILL, P.J.

Appellant, Mark Vandergriff, appeals from the judgment of the Ashtabula County Court of Common Pleas entered on November 29, 1999. After a jury trial, appellant was convicted of domestic violence in violation of *R.C. 2919.25(A)*, a fifth degree felony. The following facts are relevant to a determination of this appeal.

The victim in this case was the twelve-year-old stepdaughter of appellant. Appellant had been married to the victim's mother ("Mrs. Vandergriff") for approximately two years. Mrs. Vandergriff

also had three other children from two different fathers. The incident in question occurred at the family home in Jefferson, Ohio.

[*2] On the morning of January 24, 1999, appellant and Mrs. Vandergriff were sleeping in the living room due to home renovations. The victim came downstairs to make breakfast for her sisters. Appellant, in an unpleasant manner, told the victim to go back upstairs, because Mrs. Vandergriff would be making breakfast when she awoke. Shortly thereafter, the victim came back downstairs to ask her mother for the new address of her previous stepfather, whom she wished to write. This person had been the victim's stepfather until she was seven years old. He had been in prison since that time. Appellant had forbidden the victim from having contact with him. To the victim, this person was a father-figure with whom she had maintained some contact.

That morning, appellant told the victim she could not write to her former stepfather. The victim defiantly persisted in her request. An altercation ensued. The victim used vile adjectives to describe appellant and, according to her mother, was yelling "you're not my f*****g dad. I don't have to listen to you." Appellant also began yelling.

According to the testimony of the victim, which was largely corroborated by Mrs. Vandergriff, appellant cornered the [*3] victim on a couch in the living room. Appellant grabbed her arm and cursed at her. Appellant then placed both of his hands on the victim's throat, but did not actually choke her. Mrs. Vandergriff then jumped on appellant's back to pull him away. Appellant then hit the victim solidly in the arm, leaving a visible mark. Appellant subsequently slammed the victim into a wall and, grabbing her by the hair, flung her towards the stairs back up to her bedroom. The victim went upstairs, but later came back down to use the only bathroom in the house, whereupon another scuffle ensued. Mrs. Vandergriff then told appellant "it's time to leave." Appellant asked Mrs. Vandergriff to take him to his mother's home, which, apparently, she did.

Mrs. Vandergriff was called as a prosecution witness at trial. However, her testimony as to what occurred had changed since the incident. She testified favorably for appellant in spite of having filed the initial complaint. With the leave of the court, the prosecutor cross-examined her and used her prior statement to the police to impeach portions of her testimony. On cross-examination by the defense, Mrs. Vandergriff testified that the victim did not like appellant, [*4] that she was disobedient, and that she pitched fits whenever she did not get her way. She testified that the victim was a "fighter," that she would fight with appellant and, in fact, had hit the mother before. She testified that she did not feel she had any control over the victim. She also testified that the victim never "accepted" her marriage to appellant. Mrs. Vandergriff testified that appellant had her permission to discipline the children when necessary.

The victim testified that she did not get along with her stepfather because he is a mean drunk. She testified that he disciplined her by hitting her, putting her in her room, screaming at her, and spitting on her. On cross-examination, she testified that she does lie to her parents from time to time, that she does not "get along" with appellant, that she does sometimes misbehave, and that immediately prior to the incident, she called appellant two vile names. She testified that she did not want appellant to return to the household because of his drinking and, because of the way he treated her mother, her sisters, and herself.

Appellant did not testify. In closing arguments, the state acknowledged that a parent is permitted [*5] by law to use physical discipline on children, but that appellant's actions exceeded the limit. Defense counsel argued that the victim was an unruly child and that her testimony was not credible.

Counsel also argued that appellant had the right to discipline the child. In making this argument, counsel essentially, if not literally, admitted that appellant inflicted physical harm on the victim as defined by *R.C. 2901.01(3)*. Counsel argued this was legal discipline of the child and that it did not rise to the level of domestic violence.

However, counsel did not seek, nor did the trial court include, any special jury instruction on the affirmative defense that physical harm inflicted by a parent may be permissible if it is proper and reasonable parental discipline. The domestic violence instruction submitted to the jury was practically verbatim with *4 Ohio Jury Instructions (1997), Section 519.25*, which states, in relevant part:

"The defendant is charged with domestic violence. Before you can find the defendant guilty, you must find beyond a reasonable doubt, that *** the defendant knowingly caused physical harm to a family or household member.

"A person [*6] acts knowingly, regardless of his purpose, when (he is aware that his conduct will probably cause a certain result) (he is aware that his conduct will probably be of a certain nature). A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"The state charges that the act *** of the defendant caused *** (physical harm to [person] ***). Cause is an essential element of the offense. Cause is an act *** which in a natural and continuous sequence directly produces the *** (physical harm to [person] ***), and without which it would not have occurred.

"'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its quantity or duration."

This is the same instruction as would have been used had appellant been accused of committing the offense against his spouse, as opposed to a child. The trial court instructed the jury that "it is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be." No instruction was given to the jury regarding the use of corporal punishment [*7] when it constitutes proper and reasonable parental discipline as a defense to a charge of domestic violence. The jury returned a verdict of guilty, and judgment was entered against appellant. From this judgment, appellant timely filed notice of appeal, assigning the following errors:

"[1]. The trial court erred in overruling appellant's motion for acquittal pursuant to *Crim.R. 29* and appellant's conviction is against the manifest weight of the evidence.

"[2]. The trial court erred to the prejudice of appellant in its instruction to the jury as to the element of 'physical harm' in regard to the offense of domestic violence.

"[3]. The appellant was denied the effective assistance of counsel as defense counsel's actions and omissions at appellant's trial deprived appellant of the effective assistance of counsel as guaranteed by the *Sixth* and *Fourteenth Amendments to the U.S. Constitution* and *Article I, Section 10 of the Ohio Constitution.*"

We will address appellant's assignments of error in a consolidated fashion, focusing primarily on the third assignment of error. In his third assignment of error, appellant asserts that he was denied effective assistance of counsel. [HN1] To establish [*8] a claim for ineffective assistance of counsel, the defendant must prove that counsel's performance fell below an objective standard of reasonable representation and that prejudice arises from counsel's performance. *State v. Bradley*

(1989), 42 Ohio St. 3d 136, 538 N.E.2d 373, paragraph two of syllabus. This is a two pronged analysis.

[HN2] The first prong requires a showing that counsel's performance fell below an objective standard of reasonable representation. "In order to determine whether an attorney's performance was deficient, the trial court must inquire whether the attorney provided "reasonably effective assistance, considering all of the circumstances." *State v. Laird* (Dec. 15, 2000), Portage App. No. 99-P-0069, unreported, *2000 Ohio App. LEXIS 5924* at *7-8, quoting *State v. Loza (1994), 71 Ohio St. 3d 61, 83, 641 N.E.2d 1082*. [HN3] A properly licensed attorney is presumed to be competent and, thus, judicial scrutiny of his or her performance must be highly deferential. *Strickland v. Washington (1984), 466 U.S. 668, 689, 80 L. Ed. 2d 674, 104 S. Ct. 2052*. An attorney's strategic decisions and trial tactics will not support [*9] a claim of ineffective assistance of counsel. *State v. Clayton (1980), 62 Ohio St. 2d 45, 48-49, 402 N.E.2d 1189*.

[HN4] To demonstrate the second prong, prejudice, the defendant must demonstrate that there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Bradley*, paragraph three of syllabus. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *42 Ohio St. 3d at 142*, quoting *Strickland at 694*. Appellant argues that "proper and reasonable parental discipline" was a viable defense in his case, and that his counsel failed to effectively raise this defense at trial. We agree.

In *State v. Suchomski (1991), 58 Ohio St. 3d 74, 567 N.E.2d 1304*, [HN5] the Supreme Court of Ohio stated that there is "nothing" in *R.C. 2919.25(A)* that prevents a parent from properly disciplining his or her child. *Id. at 75*. In *Suchomski*, this conclusion was established by an evaluation of the element of "physical harm." Harm, in part, is defined as an injury. Injury was defined as the invasion of any legally protected interest [*10] of another. *Id.* The Supreme Court stated that "[a] child does not have any legally protected interest which is invaded by proper and reasonable parental discipline." *Id.* Subsequently, [HN6] in domestic violence cases where the victim is a child, appellate courts have recognized the affirmative defense of "proper and reasonable parental discipline" of the child. See, *State v. Hart (1996), 110 Ohio App. 3d 250, 673 N.E.2d 992*; *State v. Jones (2000), 140 Ohio App. 3d 422, 747 N.E.2d 891*.

[HN7] *R.C. 2901.05(C)(2)* defines a non-statutory affirmative defense as a defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence. *R.C. 2901.05(A)* states that the burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, is upon the accused. *State v. Doran (1983), 5 Ohio St. 3d 187, 193, 449 N.E.2d 1295*. This standard applies to the parental discipline defense in domestic violence cases. *State v. Hicks (1993), 88 Ohio App. 3d 515, 520, 624 N.E.2d 332*. [*11]

[HN8] Although it is an affirmative defense, the issue need not be raised prior to trial under *Crim.R. 12*. As the defense presents a question of fact, it is only capable of resolution by trial on the general issue. This case presents a question of whether the defense was properly raised by appellant, because, as was his right, he chose not to testify at the trial, and the defense otherwise did not put on any direct evidence regarding the issue. Having declined to put on any direct evidence, the question is whether appellant failed to meet his burden as a matter of law.

[HN9] The burden of proof encompasses two concepts, the burden of production and the burden of persuasion. *State v. Robinson (1976), 47 Ohio St. 2d 103, 107, 351 N.E.2d 88*. The burden of

production requires a party to come forward with, or to produce, sufficient evidence to make out a prima facie case of the defense. *Id.* The court in *Robinson* held that this evidence may come from any source. *Id. at 113*. "Any" source would include testimonial evidence, and testimony adduced on cross-examination is no less "evidence" than is testimony adduced on direct examination. Therefore, it is possible [*12] that a party could meet its burden of production on an issue without presenting its own witnesses to testify on the issue, and, consequently, a trial court should not *require* that a defendant testify in order to assert this defense.

In this case, counsel developed evidence regarding the defense through his cross-examination of the state's witnesses. The following are excerpts from defense counsel's cross examination of Mrs. Vandergriff:

"Q: How would you characterize the relationship between Christina and Mark?

"A: Well, *** they didn't see eye to eye.

"Q: Do you know what may have caused that?

"A: *** she doesn't like Mark.

" ***

"Q: How about the relationship between the rest of your kids and Mark? How is that?

"A: They all seem to get along normal, you know, stuff. When you be bad, you get told you can't do something.

"Q: Has Christina been disobedient to Mark?

"A: She's been disobedient to me, too.

"Q: How often does that happen?

"A: Usually when she doesn't get her way.

"Q: What does she do? How does she become? ***

"A: Well, if you tell her she can't do something, she won't listen, throw a fit.

" ***

"Q: Have you ever had to discipline your daughter?

" ***

[*13] "A: Yes.

"Q: What do you usually do?

"A: I try to ground her.

"Q: Have you ever had to physically - -

"A: Yes.

"Q: What do you usually do?

"A: Well, she's a fighter.

"Q: How do you mean?

"A: I mean, if you tell her to go to your room, you can't even drag her there or nothing like that.

"Q: Does she fight you back?

"A: Yeah.

"Q: Has she ever assaulted you?

" ***

"Q: Has she ever hit you?

"A: Yes, if you go to spank her or something like that, tell her no, you're not going, she'll raise her fist back, hit me, hit me.

"Q: Challenging you to hit her?

"A: Uh-huh."

Mrs. Vandergriff also testified that appellant had her permission to discipline her daughter when necessary. The following are excerpts from defense counsel's cross-examination of the victim, Christina Corliss:

"Q: Christina, do you get along with Mark?

"A: No.

"Q: Have you ever gotten along with him?

"A: Maybe a couple times.

" ***

"Q: Have the two of you been having problems for some time?

"A: Yes.

" ***

"Q: Do you ever misbehave?

"A: Yeah.

"Q: Do you ever use profanity?

" ***

"A: Yeah, I have.

"Q: Have you - - swear towards Mark?

"A: Yes.

" ***

"Q: Did you swear at Mark that day?

"A: Yes.

[*14] "Q: What did you say to him?

"A: I called him an asshole.

"Q: Use any other words? It's okay. You can say it here.

"A: Cock sucker.

" ***

"Q: Under what circumstances don't you obey him?

"A: Like, there's been a couple times where I've argued with him about stuff but.

"Q: Has he ever told you no, you can't do something?

"A: Yeah.

"Q: And you did it anyway?

"A: Maybe a couple times, yeah.

" ***

"Q: Who sets the rules in the house?

"A: Mark.

"Q: Did you like him setting the rules in the house?

"A: No."

The following are excerpts from defense counsel's closing argument:

"[You have to decide] whether his conduct rose to the level of domestic violence.

"Who do you believe in this case? You have heard the testimony from the child's mother and from the child. Christina, I don't want to pick on her but I hate to say this but she is a behavior problem. She has problems. She's mouthy. This is by her own mother's admission. She's mouthy. She fights with her mother. She's hit her mother. She's hit Mark. She's a handful.

"You have to think of something and a lot of you are parents. How would you react if your son or daughter, and I hate to use this word, called you a cock [*15] sucker? I know what would happen if I called my father that when I was thirteen. I probably would have bruises on me.

" ***

"I think the State has failed to give you that proof. It's shaky. The case is shaky. It's not about whether Mark Vandergriff did something or nothing. It's whether or not his behavior rose to the level of domestic violence. You can discipline your child in this State.

"These are stepfathers, not a natural father, but she's living in his house and lives by his rules. She doesn't want to do that. She doesn't want to live by his rules. She won't listen to him. She won't even listen to her own mother. He is permitted to discipline her.

"Are we at the point now where we're prosecuting parents? Where is the line drawn? Where do you draw the line? I mean, times have changed. ***

" ***

" *** Mark Vandergriff's behavior did not rise to the level of domestic violence. It's parental discipline. Discipline of a child who just will not take discipline, will not listen to her parents. She

does what she wants to do and when she doesn't get what she wants, there's hell to pay. Thank you all for listening."

Counsel clearly attempted to raise the defense, devoting much of [*16] his cross-examination of the victim and Mrs. Vandergriff to eliciting evidence of the victim's poor behavior and arguing the defense in closing argument. It is apparent that counsel did not make a strategic decision not to raise the defense, rather, he did present the defense, although without testimony from appellant. Under the facts of this case, asserting the defense of proper and reasonable parental discipline was the only rational avenue for the defense to take. An essential part of raising the defense is getting a jury instruction that permits a finding it has been met. In *Hicks*, the Tenth Appellate District proffered the following instruction as appropriate in cases where the defense has been raised:

"The defendant has asserted an affirmative defense that she (he) was engaged in properly disciplining her (his) child at the time alleged. Nothing in the domestic violence statute prevents a parent from properly disciplining her (his) child. If you find by a preponderance of the evidence that the defendant was engaged in proper and reasonable parental discipline at the time, then you shall find the defendant not guilty.

"'Proper,' for purposes of this defense, means suitable [*17] or appropriate.

"'Reasonable,' for purposes of this defense, means not extreme or excessive."

Id., 88 Ohio App. 3d at 520. This instruction has subsequently been approved by the Fifth and Third Appellate Districts in *State v. Dunlap* (Aug. 21, 1995), Licking App. No. 95-CA-2, unreported, *1995 Ohio App. LEXIS 4231*, and *Hart, 110 Ohio App. 3d 250, 673 N.E.2d 992*, respectively. *Hart* also points out that [HN10] "the propriety and reasonableness of corporal punishment in each case must be judged in light of the totality of the circumstances." *Id. at 256*.

The question remains whether the trial court, under the circumstances of this case, was required to give the instruction. [HN11] When a defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable jurors as to the existence of the affirmative defense, the defendant has met his burden of production on that issue. *State v. Mogul* (May 15, 1998), Trumbull App. Nos. 97-T-0018, 99-T-0067, unreported, *1998 Ohio App. LEXIS 2186*, at *10.

Appellant presented some evidence that the child in this case was a discipline [*18] problem and that he was permitted by the child's mother to discipline her when appropriate. Appellant also presented evidence that the child acted in a manner that cried out for some discipline. While some of the actions taken by the appellant were, to say the least, distasteful, we decline to usurp the role of the trier of fact. [HN12] "Once a defendant has presented evidence on the defense of parental discipline, the [trier of fact] must weigh whether the actions constituted proper and reasonable discipline, or whether they constituted an injury within the meaning set forth in *Suchomski, supra.*" *State v. Mills* (Mar. 26, 1997), Hamilton App. No. C-960482, unreported, *1997 Ohio App. LEXIS 1161*, at *5. In a like holding, the court in *Hart* concluded that the verdict of guilty was against the manifest weight of the evidence where the trier of fact had failed to consider the defense of parental discipline. *110 Ohio App. 3d at 256*.

Focusing on appellant's third assignment of error, we conclude that, having met the burden of production on the issue, appellant was entitled to a jury instruction on the issue. Defense counsel did not ask for one and, thereby, committed [*19] an error, falling below an objective standard of

reasonable representation. Having argued the defense in his closing, counsel essentially admitted to the elements of the offense *as the offense was presented to the jury* in the jury instruction. Under these circumstances, the jury could reach but one conclusion, guilty as charged.

Addressing the second prong of the *Strickland/Bradley* analysis, confidence in the outcome of this trial has been sufficiently undermined to warrant reversal. In this light, we would note that, employing a totality of the circumstances test, the level of violence employed by a parent, in itself, is not determinative of the issue. For example, in *Galion v. Martin* (Dec. 12, 1991), Crawford App. No. 3-91-6, unreported, *1991 Ohio App. LEXIS 6092*, one open handed slap to the face, sufficient in force to knock the child down, was found to constitute domestic violence under the facts of that case. In contrast, in *State v. Ivey (1994), 98 Ohio App. 3d 249, 648 N.E.2d 519*, severely whipping a child's buttocks with a belt, when no permanent harm ensued, was found not to be domestic violence. In rendering this judgment, this court [*20] expresses no opinion on appellant's ultimate guilt or innocence. By no means do we applaud the appellant, however, a question of fact was presented that should have been resolved by a jury, not by a court as a matter of law.

Simply put, appellant was denied the effective assistance of counsel and, unfortunately, under these circumstances, the matter must be retried. Appellant's third assignment of error has merit. This finding renders the first and second assignments of error moot. The judgment of the trial court is reversed, and the matter is remanded for proceedings consistent with this opinion.

PRESIDING JUDGE WILLIAM M. O'NEILL

CHRISTLEY, J., dissents with Dissenting Opinion,

NADER, J., concurs.

DISSENT BY: JUDITH A. CHRISTLEY

DISSENT

DISSENTING OPINION

CHRISTLEY, J.

For the reasons that follow, I respectfully dissent from the majority opinion which concludes that appellant was denied effective assistance of counsel when his defense counsel failed to request a jury instruction on parental discipline. [1]

1 I write separately to express my serious reservations that appellant was denied effective assistance of counsel. As such, I express no opinion at this time as to appellant's remaining assignments of error.

[*21] In order to successfully claim ineffective assistance of counsel, appellant had to meet the two-pronged test announced by the United States Supreme Court in *Strickland v. Washington (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052*, and adopted by the Supreme Court of Ohio in *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373*:

"'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the

defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *State v. DiMeolo, 1992 Ohio App. LEXIS 5045* (Sept. 30, 1992), Ashtabula App. No. 91-A-1680, unreported, 1992 WL 267379, at 3, quoting *Strickland at 687*. See, also, *Bradley* at paragraphs two and three of the syllabus.

"To warrant reversal, 'the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of [*22] the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Bradley at 142*, quoting *Strickland at 694*.

Initially, the majority concludes that defense counsel's failure to request a jury instruction on the issue of parental discipline fell below the objective standard of reasonable representation. While defense counsel could have sought such an instruction, it would have been error for the trial court to provide it. Hence, the inaction of defense counsel was hardly prejudicial such that the outcome of the trial was sufficiently undermined.

There is no question that proper and reasonable parental discipline can be employed by a parent without violating *R.C. 2919.25(A)*, thereby creating an affirmative defense to a charge of domestic violence. [2] *State v. Suchomski (1991), 58 Ohio St. 3d 74, 75, 567 N.E.2d 1304*; *State v. Hart (1996), 110 Ohio App. 3d 250, 254, 673 N.E.2d 992*; *Hicks at 517-520*. As such, appellant had the burden, by a preponderance of the evidence, of going forward with evidence *sufficient* to raise the affirmative defense [*23] of parental discipline. *R.C. 2901.05(A)*; *State v. Palmer (1997), 80 Ohio St. 3d 543, 563-564, 687 N.E.2d 685*; *State v. Melchior (1978), 56 Ohio St. 2d 15, 20, 381 N.E.2d 195*.

2 "Proper" for purposes of the parental discipline defense, means suitable or appropriate, while "reasonable" means not extreme or excessive. *State v. Hicks (1993), 88 Ohio App. 3d 515, 520, 624 N.E.2d 332*.

'"The proper standard for determining *** whether a defendant has successfully raised an affirmative defense *** is to inquire whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue.'" *Palmer at 564*, quoting *Melchior* at paragraph one of the syllabus. See, also, *State v. Brady (1988), 48 Ohio App. 3d 41, 548 N.E.2d 278*, paragraph one of the syllabus; *State v. Castellano, 1994 Ohio App. LEXIS 2953* (June 30, 1994), Geauga App. No. 92-G-1737, unreported, [*24] 1994 WL 446955, at 4. "Evidence is sufficient where a reasonable doubt of guilty has arisen ***. *** If the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted." (Citations omitted.) *Melchior at 20*. As such, a trial court *cannot* give a jury instruction on an affirmative defense if a defendant has failed to meet his or her burden of proof. *Palmer at 563-564*; *Melchior at 20*;

In the instant cause, no reasonable jury could possibly believe that appellant used reasonable and proper parental discipline. At trial, appellant presented evidence, through the testimony of his wife, Mrs. Vandergriff, that he had the *right* to discipline his stepdaughter. However, *nowhere* is there evidence indicating an attempt on the part of appellant to discipline the child at the time the

altercation occurred. For instance, appellant did not testify that he was, indeed, disciplining the child. Nor did defense counsel ask Mrs. Vandergriff, who observed the incident, whether she believed appellant was disciplining the child. To the contrary, [*25] the evidence reveals that appellant was *in a rage* at the time of the incident. [3]

3 The following exchange took place at trial between the prosecuting attorney and Mrs. Vandergriff:

"Q. So, [appellant] was on top of your daughter; is that correct? You pulled him off?

"A. Yeah.

"Q. *And it's fair to say he was in a rage?*

"A. *Yeah*. They were both yelling and she was yelling, 'you're not my fucking dad. I don't have to listen to you.'" (Emphasis added.)

Under these circumstances, not only was the evidence insufficient to raise the affirmative defense of parental discipline, it was insufficient to warrant an instruction on that issue. Even if defense counsel requested such an instruction, the trial court could have properly refused to instruct the jury on parental discipline as there was insufficient evidence to support the instruction. See, generally, *Palmer at 563-564*; *Melchior at 20*. Therefore, because appellant has failed to demonstrate that defense counsel's performance was deficient, [*26] he did not satisfy the first prong of the *Strickland* test.

Furthermore, appellant was unable to demonstrate prejudice, and as such, he failed to satisfy the second prong of the *Strickland* test. Contrary to the majority's position, the second prong of the *Strickland* test requires this court to act as the trier of fact and "*consider the totality of the evidence before the *** jury*" to determine whether there is a reasonable probability that the outcome of the trial would have been different in the absence of trial counsel's deficient performance. (Emphasis added.) *Bradley at 142*.

In the instant matter, even if the instruction on parental discipline were improvidently given, there is *no evidence* to support the existence of a reasonable probability that the jury would have found appellant not guilty of domestic violence. It cannot seriously be argued that picking up a twelve year old child by the arms, slamming her against the wall, then grabbing her by the hair and throwing her towards the stairs, constitutes reasonable and proper parental discipline. See, *e.g.*, *State v. Jones, 1999 Ohio App. LEXIS 1957* (Apr. 23, 1999), Montgomery App. No. 17381, unreported, 1999 WL 249221, at 3 [*27] (holding that a rational trier of fact could have found defendant guilty of domestic violence when he grabbed his girlfriend by the hair, flung her down the hallway and into a door jamb, and slammed her up against a door).

While appellant was permitted by his wife to discipline his stepdaughter, there was *absolutely no evidence* presented at trial to show that his conduct was motivated by a desire to discipline. To the contrary, when asked by the prosecuting attorney whether appellant was *in a rage* at the time of the altercation, Mrs. Vandergriff answered in the *affirmative*. The fact that appellant acted in a heat of anger went *unchallenged* at trial. "*Striking a child in anger is not the same as disciplining an unruly child*." (Emphasis added.) *Galion v. Martin, 1991 Ohio App. LEXIS 6092* (Dec. 12, 1991), Crawford App. No. 3-91-6, unreported, 1991 WL 261835, at 1. See, also, *State v. Howard, 1999 Ohio App. LEXIS 5767* (Dec. 3, 1999), Lake App. No. 98-L-265, unreported, 1999 WL 1313691, at 4. This is precisely what the domestic violence statute seeks to prevent, to-wit: familial assaults.

In summation, under the circumstances presented in this case, I would reject appellant's claim of [*28] ineffective assistance of counsel. First, defense counsel's performance was not deficient as the evidence presented at trial was insufficient to support an instruction on parental discipline. Second, even if the instruction had been given, appellant has not shown the existence of a reasonable probability that the jury verdict would have been different; ergo, prejudice did not arise.

The purpose of parental discipline is "to impress upon a child the importance of listening, understanding, and correcting his or her behavior to conform to the established rules of conduct." *In re Jandrew, 1997 Ohio App. LEXIS 5999* (Dec. 29, 1997), Washington App. No. 97 CA 4, unreported, 1997 WL 802848, at 11. I respect the reality that parents of teenagers are frequently faced with the temptation to do violence to their offspring. However, the vast majority of parents have managed to exercise sufficient restraint such that a more suitable course of action can be pursued. That is what civilized people do, and that is what we must require them to do.

Based on the foregoing discussion, I respectfully dissent from the majority opinion and would affirm the judgment of the trial [*29] court.
JUDGE JUDITH A. CHRISTLEY

STATE OF OHIO, Plaintiff-Appellee, - vs - TIMOTHY K. RICHTER, Defendant-Appellant.

CASE NOS. 2003-L-065 and 2003-L-066

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

2004 Ohio 6682*; *2004 Ohio App. LEXIS 6230

December 10, 2004, Decided

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Richter, 105 Ohio St. 3d 1518, 2005 Ohio 1880, 826 N.E.2d 315, 2005 Ohio LEXIS 912 (2005)*

PRIOR HISTORY: [**1] Criminal Appeal from the Court of Common Pleas, Case Nos. 01 CR 000507 and 01 CR 000231. Affirmed.
State v. Richter, 2003 Ohio 6734, 2003 Ohio App. LEXIS 5987 (Ohio Ct. App., Lake County, Dec. 12, 2003)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed a judgment by the Lake County Court of Common Pleas (Ohio) that denied his postconviction petition; defendant claimed that the trial court failed to properly weigh the credibility of a letter and grant a hearing before denying the motion.

OVERVIEW: Defendant pleaded guilty to domestic violence, attempted rape, and gross sexual imposition in two separate actions. On appeal or the rape and gross sexual imposition convictions, it was determined that defendant's plea was knowing and voluntary and that he was likely to reoffend. The only additional evidence presented by defendant in his postconviction motion was a letter sent to him from counsel while he was incarcerated informing him that he was eligible for judicial release. The appellate court held that res judicata barred defendant's postconviction motion because he had raised the identical issues in his delayed appeal. As the issue of defendant's eligibility for judicial release was unsuccessfully argued by defendant in his direct appeal, the letter did not permit defendant to elude the res judicata bar. Since defendant was represented by different counsel on appeal, any ineffective assistance claims relating to trial counsel should have been raised on direct appeal. Defendant never filed a direct appeal of trial court domestic violence plea and the notice of appeal period had lapsed.

OUTCOME: The judgment was affirmed.

CORE TERMS: post-conviction, sexual, direct appeal, res judicata, predator, assignment of error, guilty plea, medications, sentence, trial counsel, assistance of counsel, ineffective, domestic violence, delayed, sentencing hearing, psychotropic medications, imprisonment, psychiatric, plea

hearing, pled guilty, attempted rape, degree felony, failed to inform, sentencing, eligible, inform, judgment of conviction, appointment of counsel, expert witness, respectfully

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
Criminal Law & Procedure > Double Jeopardy > Res Judicata
Criminal Law & Procedure > Counsel > General Overview
[HN1] Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
Criminal Law & Procedure > Double Jeopardy > Res Judicata
Criminal Law & Procedure > Appeals > Records on Appeal
[HN2] As a direct appeal from a judgment of conviction is limited solely to the trial court record, a petition for postconviction relief may not be barred by res judicata if the claims set forth in the petition are based on evidence dehors the record. Moreover, any additional evidence attached to a petition for postconviction relief must meet a "threshold standard of cogency." In other words, the additional evidence must be more than marginally significant and not discernible from an examination of the existing trial court record in order to defeat a res judicata bar.

Criminal Law & Procedure > Double Jeopardy > Res Judicata
Criminal Law & Procedure > Counsel > Effective Assistance > Appeals
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
[HN3] Res judicata does not apply to an ineffective assistance of counsel claim only when an appellant's trial counsel and appellate counsel are the same, as counsel has an inherent conflict of interest.

COUNSEL: Charles E. Coulson, Lake County Prosecutor, and Amy E. Cheatham, Assistant Prosecutor, Painesville, OH (For Plaintiff-Appellee).

Paul J. Mooney, Cleveland, OH (For Defendant-Appellant).

JUDGES: CYNTHIA WESTCOTT RICE, J. DIANE V. GRENDELL, J., concurs, WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

OPINION BY: CYNTHIA WESTCOTT RICE

OPINION

CYNTHIA WESTCOTT RICE, J.

[*1] This appeal arises from the Lake County Court of Common Pleas. On October 17, 2001, appellant, Timothy K. Richter, pled guilty to one count of domestic violence in Case No. 01-CR-

000231 and also pled guilty to one count of attempted rape in violation of *R.C. 2923.02* and *2907.02*, a second degree felony, and three counts of gross sexual imposition in violation of *R.C. 2907.05(A)(4)*, third degree felonies in Case No. 01-CR-000507. The charges arose from Richter's conduct with his stepdaughter who was between the ages of seven and twelve at the time the incidents occurred.

[*2] On November 14, 2001, a sentencing [**2] hearing took place relating to both cases. Richter was sentenced to twelve months imprisonment on the domestic violence charge, as well as six years imprisonment for the attempted rape conviction; three years for one count of gross sexual imposition; and one year each on the two remaining counts of gross sexual imposition. Richter was ordered to serve the sentences in both cases concurrent with each other, but all the sentences in the second case were to be served consecutively to each other, for a total term of eleven years imprisonment. Richter was also adjudicated a sexual predator.

[*3] On May 24, 2002, Richter filed a delayed appeal of the guilty plea and sexual predator adjudication with this court. [1] In its opinion dated December 12, 2003, this court affirmed the judgment of the trial court. [2]

1 *State v. Richter, 11th Dist. No. 2002-L-080, 2003 Ohio 6734*.

2 Id.

[*4] On June 20, 2002, appellant filed three post-conviction motions with the trial court: a motion for [**3] appointment of counsel, motion for expert witness, as well as a post-conviction petition. In the motion for appointment of counsel, Richter sought an order appointing counsel to represent him on his petition for post-conviction relief. That motion was denied by the trial court.

[*5] In the motion for expert witness, Richter sought an order to allow Richter to retain "a psychiatrist with specific expertise in psychiatric medicines" to assist in his post-conviction petition. The trial court also denied that motion.

[*6] Richter also filed a petition for post-conviction relief and set forth five grounds for relief: (1) he was denied effective assistance of counsel at his change of plea hearing and sentencing hearing when trial counsel informed Richter he was eligible for judicial release; (2) he was denied effective assistance of counsel at his sentencing hearing when counsel failed to inform him of his right to appeal his sentence and sexual predator adjudication; (3) the trial court erred at sentencing when it failed to inform Richter that his stated prison term exceeded the maximum sentence for his most serious offense and he could appeal his sentence; (4) [**4] his guilty plea was not voluntary as neither trial counsel nor the court addressed the effect of psychotropic medications on Richter's plea; and (5) the court failed to comply with the sentencing requirements imposed by *R.C. 2929.19*.

[*7] The state filed a response to the post-conviction petition and a motion for summary judgment. In a judgment entry dated March 24, 2003, the trial court denied Richter's post-conviction petition. In its judgment, the trial court addressed the merits of Richter's arguments and included findings of fact and conclusions of law.

[*8] Richter subsequently filed this appeal of the denial of his post-conviction petition in both trial court cases. Both appeals have been consolidated by this court for all purposes.

[*9] Richter presents a single assignment of error on appeal:

[*10] "The trial court abused its discretion when it failed to properly weigh the credibility of appellant's affidavit and grant appellant a hearing before denying his motion for post-conviction relief."

[*11] As noted in the foregoing, Richter filed a delayed appeal of his guilty plea in trial [**5] court Case No. 01 CR 000507 and the sexual predator adjudication. That appeal

was still pending at the time Richter filed his petition for post-conviction relief. In that direct appeal to this court, Richter raised four assignments of error.

[*12] The first assignment of error alleged his guilty plea was not knowing and voluntary as Richter had been under the influence of psychotropic medications when the plea was made. A review of the record revealed the trial court inquired into what medications Richter was currently taking, and whether they affected his ability to understand what was transpiring. Richter assured the court that he was able to understand the proceedings. The court also asked Richter to state the day, date and time, to which he responded correctly. This court determined, based on an examination of the record, Richter's plea was knowing and voluntary and was not affected by the medications he was taking. [3]

3 *Richter, P21*.

[*13] In his second assignment of error [**6] Richter alleged the sexual predator adjudication was against the manifest weight of the evidence. Richter did not dispute that he had committed a sexually-oriented offense, but challenged the finding of a likelihood to reoffend. This court concluded, based on the record, the state had established, through clear and convincing evidence that Richter was likely to reoffend. [4]

4 *Id. at P28.*

[*14] The third assignment of error related to the trial court's failure to adhere to the statutory requirements in making the sexual predator determination. This court concluded the trial court properly considered the statutory factors and properly adhered to the procedural requirements of a sexual predator hearing. [5]

5 *Id. at P37.*

[*15] The fourth and final assignment of error was an ineffective assistance of counsel claim, [**7] alleging Richter's trial counsel erred in permitting him to enter a guilty

plea when he was under the influence of medications. As it had noted in the first assignment the plea was knowing and voluntary, this court concluded that Richter had suffered no prejudice and thus did not address whether counsel's performance was deficient. Therefore, this court found all of Richter's assignments of error to be without merit and the judgment of the trial court was affirmed. [6]

6 *Richter, at P43.*

[*16] In his petition, Richter raised the identical issues as grounds for post-conviction relief that were pending in his delayed appeal with this court. The trial court elected to address the issues raised in Richter's petition on the merits, and ultimately denied the petition. This court subsequently addressed the merits of Richter's arguments on direct appeal. However, rather than addressing the merits of Richter's petition, we must first determine whether the current appeal of the petition is barred by [**8] the doctrine of res judicata.

[*17] [HN1] "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment*." [7]

7 (Emphasis added.) *State v. Perry (1967), 10 Ohio St.2d 175, 226 N.E.2d 104*.

[*18] [HN2] As a direct appeal from a judgment of conviction is limited solely to the trial court record, a petition for post-conviction relief may not be barred by res judicata if the claims set forth in the petition are based on evidence dehors the record. [8] Moreover, any additional evidence attached to a petition for post-conviction relief must meet a

8 *State v. Cole (1982), 2 Ohio St.3d 112, 2 Ohio B. 661, 443 N.E.2d 169.*

[**9] "threshold standard of cogency." [9] In other words, the additional evidence must be more than marginally significant and not discernible from an examination of the existing trial court record in order to defeat a res judicata bar. [10]

9 (Citation omitted.) *State v. Lawson (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362*.

10 Id.

[*19] In the instant case, the only additional evidence presented by Richter in his post-conviction petition was a letter sent to him from counsel while he was incarcerated. Dated December 19, 2001, the letter informs Richter that he is eligible for judicial release. As the issue of Richter's eligibility for judicial release was argued by Richter unsuccessfully in his direct appeal, we conclude this letter, containing the same information which served as the basis for the contention previously asserted by Richter on appeal, does not permit Richter to elude the res judicata bar.

[*20] [HN3] Res judicata does not apply to an ineffective assistance of counsel [**10] claim only when the appellant's trial counsel and appellate counsel are the same, as counsel has an inherent conflict of interest. [11] In the instant case, Richter was represented by Attorney Margaret Campbell at trial and by Attorney Paul Mooney in his direct appeal. Since Richter was represented by different counsel on appeal, any ineffective assistance claims relating to trial counsel should have been raised on direct appeal.

11 *State v. Lentz (1994), 70 Ohio St.3d 527, 530, 1994 Ohio 532, 639 N.E.2d 784*.

[*21] In his direct appeal, Richter raised ineffective assistance of counsel based solely on the notion that counsel permitted him to enter a guilty plea when he was under the influence of medications. In his post-conviction petition, Richter alleges trial counsel was ineffective in failing to inform him that he could appeal his sentence and sexual predator adjudication. We conclude this claim should have been raised in the direct appeal and, as such, is now barred by res judicata.

[*22] A review [**11] of the record reveals Richter never filed a direct appeal of trial court Case No. 01 CR 000231, relating to the domestic violence plea. The delayed appeal before this court related only to trial court Case No. 01 CR 000507, which was the attempted rape and gross sexual imposition convictions. Thus, as the notice of appeal period has lapsed, this court is without jurisdiction to consider the merits of an appeal relating to the domestic violence conviction.

[*23] Thus, based on the foregoing, the issues raised by Richter in his petition for post-conviction relief are barred by the doctrine of res judicata and his assignment of error is without merit. The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

DISSENT BY: WILLIAM M. **O'NEILL**

DISSENT

WILLIAM M. O'NEILL, J., dissenting.

[*24] I respectfully disagree with the majority regarding its res judicata analysis as it relates to Richter's petition for postconviction relief. The majority correctly notes that a petition may not be barred by the doctrine of res judicata if the specific claims set forth in the [**12] petition are based on evidence dehors the record. [12] The majority

12 *State v. Cole (1982), 2 Ohio St.3d 112, 114, 2 Ohio B. 661, 443 N.E.2d 169*.

subsequently concludes that the evidence presented by Richter in his petition was merely a recitation of the identical arguments set forth in his direct appeal. I disagree.

[*25] In order for Richter's waiver of his constitutional guarantees to be valid there must be "an intentional relinquishment or abandonment of a known right or privilege." [13] Therefore, the trial court has the burden of ensuring that the waiver is voluntarily, intelligently, and knowingly made with the defendant fully understanding the charges against him. [14]

13 *State v. Mikulic (1996), 116 Ohio App.3d 787, 790, 689 N.E.2d 116*.

14 Id.

[*26] In his petition, Richter noted that he was undergoing outpatient [**13] psychiatric treatment both before and after his plea hearing and that he was on various psychotropic medications during the time he rendered his plea. The issue of medications was addressed by the trial court as the majority notes. However, the colloquy between Richter and the trial court, essentially a recitation of the time and date and whether Richter understood his plea, is hardly adequate for the state to satisfy its burden of establishing a knowing, intelligent, and voluntary plea. The evidence of Richter's psychiatric history, coupled with the number of psychotropic medications he had been taking, clearly meet the "threshold standard of cogency" for evidential material required to defeat the res judicata bar and compel an examination and evaluation of Richter prior to an acceptance of his guilty plea to establish the knowing, intelligent, and voluntary nature of his plea.

[*27] Accordingly, I must respectfully dissent.

STATE OF OHIO, Plaintiff-Appellee, vs. ROBERT SINGLETON, Defendant-Appellant.

CASE NO. 2002-L-077

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

2004 Ohio 1517; 2004 Ohio App. LEXIS 1349

March 26, 2004, Decided

SUBSEQUENT HISTORY: Appeal denied by *State v. Singleton, 2004 Ohio LEXIS 1869 (Ohio, Aug. 4, 2004)*

PRIOR HISTORY: [**1] Criminal Appeal from the Court of Common Pleas, Case No. 02 CR 000083.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Lake County Court of Common Pleas (Ohio) convicted defendant of multiple counts of corrupting another with drugs, in violation of *Ohio Rev. Code Ann. § 2925.02(A)(4)(a)*, both fourth and second-degree felonies, sexual battery, in violation of *Ohio Rev. Code Ann. § 2907.03(A)(5)*, and rape, in violation of *Ohio Rev. Code Ann. § 2907.02(A)(1)(b)*. The court also classified him as a sexual predator. Defendant appealed.

OVERVIEW: Defendant sexually molested his daughters. The appellate court held that there was sufficient evidence to support the jury's verdicts and they were not against the manifest weight of the evidence. Several individuals testified that they had used marijuana or cocaine before receiving it from defendant, that he had provided them with the substances, and that they had witnessed defendant providing the substances to his daughters. Also, while there was some inconsistency in the older daughter's testimony as to the frequency of the sexual contact, she never wavered from her contention that her father engaged in sexual conduct with her. The evidence also established that defendant compelled the younger daughter to submit by force or threat of force as she feared him and sought his approval. Further, the trial court did not err in refusing to instruct the jury on blackout as defendant failed to present evidence that he was blacked out at the time he committed sexual battery. Finally, the evidence that defendant was likely to re-offend supported his sexual predator classification. The victims were minors, there were multiple victims, and he used alcohol and drugs to impair the victims.

OUTCOME: The judgment of the trial court was affirmed.

CORE TERMS: offender, rape, accusation, assignments of error, defense counsel, in camera, cross-examination, sexual, sexual activity, manifest, blackout, false accusations, sentence, prosecutor, predator, sexual battery, sexual conduct, culpability, extrinsic, felony, sex, cross-examine, credibility, marijuana, unfounded, instruct, alcohol, cocaine, totally, spouse

LexisNexis(R) Headnotes

Evidence > Procedural Considerations > Weight & Sufficiency
[HN1] Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to a verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.

Evidence > Procedural Considerations > Weight & Sufficiency
[HN2] When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the fact finder's resolution of the conflicting testimony.

Evidence > Procedural Considerations > Weight & Sufficiency
[HN3] When determining whether a verdict is against the manifest weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The appellate court will exercise this discretionary power only in the exceptional case in which the evidence weighs heavily against the conviction.

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence
Evidence > Procedural Considerations > Weight & Sufficiency
[HN4] "Sufficiency" is a term of art meaning the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > General Overview
Evidence > Testimony > Lay Witnesses > General Overview
[HN5] The State is not required to present expert scientific testimony to establish that a substance is in fact a controlled substance. The experience and knowledge of a drug user lay witness can establish his or her competence to express an opinion on the identity of a controlled substance if a foundation for this testimony is first established.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > General Overview
[HN6] See *Ohio Rev. Code Ann. § 2925.02(A)(4)(a)*.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
[HN7] See *Ohio Rev. Code Ann. § 2907.03(A)(5)*.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
[HN8] See *Ohio Rev. Code Ann. § 2907.02(A)(1)(b)*.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
[HN9] See *Ohio Rev. Code Ann. § 2907.02(B)*.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
[HN10] With respect to rape, *Ohio Rev. Code Ann. § 2901.01(A)(1)* defines force as any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements
[HN11] The force and violence necessary to commit the crime of rape depends upon the age, size, and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size, and strength.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Children > Elements
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Penalties
[HN12] Clearly, a child cannot be found to have consented to rape. However, in order to prove the element of force necessary to sentence a defendant to life imprisonment, *Ohio Rev. Code Ann. § 2907.02(B)* requires that some amount of force must be proven beyond that force inherent in the crime itself. Yet, force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established. In fact, *Ohio Rev. Code Ann. § 2907.02(B)* requires only that minimal force or threat of force be used in the commission of the rape.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview
[HN13] As a general rule, a trial court commits prejudicial error in a criminal case when it fails to give a proposed instruction when the instruction is relevant to the facts of the case, the instruction gives a correct statement of the relevant law, and the instruction is not covered in the general charge to the jury.

Criminal Law & Procedure > Defenses > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense

[HN14] Blackout is an affirmative defense that must be proved by a preponderance of the evidence.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense
[HN15] Ohio's "blackout" jury instruction provides that where a person commits an act while unconscious as in a coma, blackout, or convulsion due to heart failure, disease, sleep, or injury, such act is not a criminal offense even though it would be a crime if such act were the product of a person's will or volition. *4 Ohio Jury Instructions § 409.05*(1989).

Criminal Law & Procedure > Defenses > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Use of Particular Evidence
[HN16] Evidence that a person was prone to abuse alcohol to the point of blackout is insufficient to warrant a jury instruction on the affirmative defense of blackout. There must be some evidence that the defendant was suffering from blackout at the time he committed the offense to warrant an instruction.

Criminal Law & Procedure > Scienter > Recklessness
[HN17] See *Ohio Rev. Code Ann. § 2901.21(B).*

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
Criminal Law & Procedure > Scienter > Knowledge
[HN18] *Ohio Rev. Code Ann. § 2907.03(A)(1)-(4)* states that liability is premised on the actor knowingly committing an act. The remaining subsections, *Ohio Rev. Code Ann. § 2907.03(A)(5)-(11)*, do not specify any degree of culpability. A review of the latter show that they are designed to protect those under the direct control or supervision of another, i.e., children and their parents, hospital or institutional patients, or students. It seems clear that the Ohio Legislature intended to impose strict liability in these instances to protect the most vulnerable members of society.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
Criminal Law & Procedure > Scienter > Knowledge
[HN19] See *Ohio Rev. Code Ann. § 2907.03(A).*

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
Criminal Law & Procedure > Scienter > Knowledge
[HN20] Because *Ohio Rev. Code Ann. § 2907.03(A)(5)* requires the jury to find that specific factual conditions exist, i.e., immediate kinship, the Ohio Legislature made clear its intent to impose strict liability. Also, the statute is not ambiguous so a court is not required to interpret it strictly against the State.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor
[HN21] The decision to admit or exclude evidence lies within the sound discretion of the trial court. An appellate court will reverse the trial court only when there has been an abuse of that discretion.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > General Overview
Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination
Evidence > Testimony > Credibility > General Overview
[HN22] Where an alleged rape victim admits on cross-examination that she has made a prior false rape accusation, the trial judge shall conduct an in camera hearing to ascertain whether sexual activity was involved and, as a result, cross-examination on the accusation would be prohibited by *Ohio Rev. Code Ann. § 2907.02(D)*, or whether the accusation was totally unfounded and therefore could be inquired into pursuant to *Ohio R. Evid. 608(B)*.

Evidence > Relevance > Relevant Evidence
Evidence > Relevance > Sex Offenses > Rape Shield Laws
[HN23] Assuming there is a good faith basis for the question, a defendant may ask a victim if he or she has made prior false accusations of sexual activity. Only if the victim responds affirmatively is the court required to conduct an in camera hearing to determine if the prior instances involved sexual activity.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders
[HN24] For an offender to be adjudicated a sexual predator, the trial court must find, by clear and convincing evidence, that the offender has been convicted of a sexually oriented offense and that the offender is likely to engage in the future in one or more sexually oriented offenses. *Ohio Rev. Code Ann. § 2950.01(E)(1)*.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence
[HN25] When reviewing a sexual predator adjudication, an appellate court must examine the record and determine whether the trier of fact had before it sufficient evidence to satisfy the burden of proof.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Adults > Elements
Criminal Law & Procedure > Guilty Pleas > General Overview
Criminal Law & Procedure > Sentencing > Mental Incapacity
[HN26] The Ohio Revised Code sets forth factors the trial court is to consider in determining whether an offender is likely to re-offend. These factors are: the offender's age; the victim's age; whether the offense involved multiple victims; whether the offender used drugs or alcohol to impair the victim of the offense or to prevent the victim from resisting; if the offender has previously been convicted of or pled guilty to a criminal offense, whether the offender completed the sentence imposed and, if the prior offense was a sex offense, whether the offender participated in programs available for sex offenders; any mental illness or mental disability of the offender; the nature of the sexual conduct with the victim and whether it was part of a demonstrated pattern of abuse; whether,

during the commission of the offense, the offender displayed cruelty or made one or more threats of cruelty; and any additional behavioral characteristics that contribute to the offender's conduct.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination
Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders
[HN27] See *Ohio Rev. Code Ann. § 2950.09(B)(2)*.

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements
Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Tests
Legal Ethics > Prosecutorial Conduct
[HN28] The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. Unless the statement made by the prosecutor in argument to a jury is so misleading or untruthful that the defendant's rights are prejudiced, which deprives him of a fair and impartial trial, the claimed error cannot be considered prejudicial. In addition, in order to consider whether a prosecutor's statement in argument to a jury is prejudicial, one must consider the cumulative effect of the comments made to the jury.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN29] When reviewing an ineffective assistance claim, the benchmark is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
[HN30] To prevail on his claim of ineffective assistance, a defendant must show that his counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. He must also show prejudice resulting from the deficient performance. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The appellate court presumes that counsel's conduct was within the wide range of reasonable professional assistance.

Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
[HN31] A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which may often be so, that course should be followed.

COUNSEL: Charles E. Coulson, Lake County Prosecutor, and Amy E. Cheatham, Assistant Proseutor, Painesville, OH (For Plaintiff-Appellee).

Paul J. Mooney, Cleveland, OH (For Defendant-Appellant).

JUDGES: JUDITH A. CHRISTLEY, J. DONALD R. FORD, P.J., concurs, WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

OPINION BY: JUDITH A. CHRISTLEY

OPINION

JUDITH A. CHRISTLEY, J.

[*P1] Appellant, Robert E. Singleton ("Singleton"), appeals from his convictions on three counts of corrupting another with drugs in violation of *R.C. 2925.02(A)(4)(a)*, fourth degree felonies; three counts of corrupting another with drugs in violation of *R.C. 2925.02(A)(4)(a)*, second degree felonies; three counts of sexual battery in violation of *R.C. 2907.03(A)(5)*, third degree felonies; and two counts of rape in violation of *R.C. 2907.02(A)(1)(b)*, first degree felonies. [1] Appellant also challenges the trial court's judgment labeling him a sexual predator. We affirm.

1 Singleton was indicted on two additional charges: one count of gross sexual imposition in violation of *R.C. 2907.05(A)(4)*, a third degree felony; and one count of rape in violation of *R.C. 2907.02(A)(1)(b)*, a first degree felony. These charges were dismissed at trial.

[**2] [*P2] Singleton is the father of Kimberly Singleton Yost ("Kimberly") and Theresa Singleton ("Theresa"). Kimberly was fifteen and Theresa was ten at the time of the incidents that form the basis of Singleton's convictions.

[*P3] Singleton, his wife Brenda, and the children lived at 802 Liberty Street, Painesville Township. Singleton and Brenda divorced and Singleton, Kimberly, and Theresa continued to live at 802 Liberty Street.

[*P4] Kimberly and Theresa then moved in with their aunt and uncle, Marcia and Sam Loudin. This living arrangement continued for several months until Kimberly was caught with marijuana in her book bag. Kimberly and Theresa then resumed living with Singleton.

[*P5] At this time, Kimberly and Theresa began sleeping in the same bed with Singleton. This sleeping arrangement started because Singleton's room had a television and was warmer than the rest of the house. During this time, Singleton fondled Kimberly.

[*P6] Kimberly moved out of her father's house when she was sixteen and moved in with her boyfriend, Tim Nelson, and his parents. Singleton then began living at his Concord Auto Body Shop ("the shop"). [**3] Theresa stayed with Singleton at the shop on several occasions. Theresa testified that it was during this time that Singleton raped her. Kimberly was twenty and Theresa was fifteen at the time of trial.

[*P7] Singleton had severe alcohol and drug problems. Kimberly, Theresa, and Kimberly's friends testified that Singleton provided them with marijuana and cocaine and that they used these drugs with Singleton both at his residence on Liberty Street and at the auto body shop.

[*P8] Allegations about Singleton's conduct eventually became known and Singleton was the subject of a thirteen count secret indictment. Singleton was tried by jury and convicted on eleven counts as set forth above. The trial court sentenced Singleton to two concurrent life sentences for his rape convictions; three concurrent three year sentences for his sexual battery convictions, with these sentences to be served consecutive to the rape sentences; three consecutive five year sentences for corrupting another with drugs, to wit: cocaine, with these sentences to be served consecutive to the rape sentences; and three concurrent one year terms for corrupting another with drugs, to wit: marijuana, [**4] with these sentences to be served concurrent to the sentences for corrupting another with cocaine. After conducting a hearing, the trial court found Singleton to be a sexual predator.

[*P9] Singleton appeals from the judgment of the trial court and sets forth seven assignments of error for our review:

[*P10] "[1.] The appellant being found guilty by the jury was against the manifest weight of the evidence.

[*P11] "[2.] The trial court erred when it failed to instruct the jury on blackout and recklessness.

[*P12] "[3.] The trial court erred to the prejudice of appellant in not permitting defense counsel to cross-examine the victim as to prior false rape accusations.

[*P13] "[4.] The trial court committed reversible error when it labeled appellant a sexual predator against the manifest weight of the evidence.

[*P14] "[5.] The trial court erred to the prejudice of appellant in failing to follow the procedural requirements of *Revised Code Section 2950.09.*

[*P15] "[6.] The appellant was denied his constitutional right to a fair and impartial trial due to the misconduct [**5] of the prosecuting attorney and then by the trial court denying appellant's motion for a mistrial.

[*P16] "[7.] The appellant was denied the effective assistance of counsel as defense counsel's actions and omissions deprived appellant of the effective assistance of counsel as guaranteed by the Sixth and *Fourteenth Amendments to the U.S. Constitution* and *Article I section X of the Ohio Constitution.*"

[*P17] In his first assignment of error, Singleton contends that his convictions were against the manifest weight of the evidence.

[*P18] [HN1] "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'

[*P19] [HN2] "When a court of appeals reverses a judgment of a trial court on the basis [**6] that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact finder's resolution of the conflicting testimony." (Internal citations and emphasis omitted.) *State v. Thompkins, 78 Ohio St.3d 380, 387, 1997 Ohio 52, 678 N.E.2d 541*.

[*P20] [HN3] When determining whether a verdict is against the manifest weight of the evidence, we review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. We will exercise this discretionary power only in the exceptional case in which the evidence weighs heavily against the conviction. Id., quoting *State v. Martin (1983), 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717*.

[*P21] Singleton first argues that the testimony of David Green ("Green"), a criminalist at the Lake County Crime Lab, failed to establish that the substances he provided to the children were in fact marijuana and cocaine. Thus, Singleton's argument [**7] presents an issue of sufficiency of the evidence, [2] and manifest weight. Green testified that he was not provided any substances on which to perform tests and that without such tests he could not conclude that a substance was marijuana or cocaine.

2 [HN4] "Sufficiency" is a term of art meaning the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. *Id. at 386*. Sufficiency is a test of adequacy. Id. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. See, also, *Crim.R. 29(A)*.

[*P22] [HN5] The state is not required to present expert scientific testimony to establish that a substance is in fact a controlled substance. In *State v McKee, 91 Ohio St.3d 292, 2001 Ohio 41, 744 N.E.2d 737*, syllabus, the Ohio Supreme Court held that "the experience and knowledge of a drug user lay witness can establish his or her competence to express an opinion on the identity of a [**8] controlled substance if a foundation for this testimony is first established."

[*P23] The state presented the testimony of Tim Nelson, Paula Baker, Kelly Nasca, Devin Williams, Kimberly, and Theresa. All of these individuals testified that they had used marijuana or cocaine before receiving it from Singleton; all testified as to the effects of such drugs; all testified as to the appearance of such drugs; and all testified that Singleton had provided them with the substances and that they had witnessed Singleton provide the substances to Kimberly and Theresa. Thus, there was sufficient evidence to support the jury's verdicts and we cannot say that the jury's verdicts finding Singleton guilty under *R.C. 2925.02(A)(4)(a)*, [3] were against the manifest weight of the evidence.

3 *R.C. 2925.02(A)(4)(a)* provides:

[HN6] [*Pa] "(A) No person shall knowingly do any of the following:

[*Pb] "***

[*Pc] "(4) By any means, do any of the following:

[*Pd] "(a) Furnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard; ***."

[**9] [*P24] Singleton next argues that the verdict convicting him of sexual battery under *R.C. 2907.03(A)(5)* [4] against Kimberly was against the manifest weight of the evidence. Specifically,

Singleton points to inconsistencies in Kimberly's testimony about the frequency of the sexual contact between her and her father.

4 *R.C. 2907.03(A)(5)* provides:

[HN7] [*Pa] "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

[*Pb] "***

[*Pc] "(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person."

[*P25] While there was some inconsistency in Kimberly's testimony as to the frequency of the contact, Kimberly never wavered from her the contention that her father engaged in sexual conduct and contact with her. The incidents at issue happened over an extended period and several years before the trial of [**10] this case. Therefore, it is not surprising that Kimberly would have difficulty recalling the exact details of the incidents. Singleton also makes much of the fact that Kimberly did not report the incidents sooner. However, the testimony makes clear that both Kimberly and Theresa loved their father and wanted to protect him. The state also presented testimony to show that Kimberly feared her father and the consequences of reporting the activity. The verdicts convicting Singleton of sexual battery were not against the manifest weight of the evidence.

[*P26] Singleton also contends that his convictions for rape under *R.C. 2907.02(A)(1)(b)* [5] are against the manifest weight of the evidence. Singleton points to inconsistencies in Theresa's testimony as to whether Singleton used a condom, whether the sex acts made her uncomfortable, and whether she voluntarily engaged in sexual acts with Singleton.

5 *R.C. 2907.02(A)(1)(b)* provides:

[HN8] [*Pa] "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

[*Pb] "***

[*Pc] "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

[**11] [*P27] There were inconsistencies in Theresa's testimony; however, once the incidents came to light she never stated that Singleton did not commit these acts. Further, the testimony makes clear that Theresa feared angering her father and sought his approval. This explains her reluctance to admit the conduct and her "independent" decision to engage in sexual acts with her father.

[*P28] Finally, under this assignment of error, Singleton argues that there was no evidence that he compelled Theresa to submit by force. [6] We disagree.

6 *R.C. 2907.02(B)* provides in relevant part:

[HN9] "Whoever violates this section is guilty of rape, a felony of the first degree. *** If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force *** whoever violates division (A)(1)(b) of this section shall be imprisoned for life." Thus, the jury was not required to find that appellant forcibly raped Theresa, to convict appellant of rape. *R.C. 2907.02(A)(1)(b)*. The finding of force served to enhance appellant's sentence.

[**12] [*P29] *R.C. 2901.01(A)(1)* [HN10] defines force as, "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." The Ohio Supreme Court has held that:

[*P30] [HN11] "The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength." *State v. Eskridge (1988), 38 Ohio St.3d 56, 526 N.E.2d 304*, paragraph one of the syllabus.

[*P31] In *State v. Dye, 82 Ohio St.3d 323, 1998 Ohio 234, 695 N.E.2d 763*, the defendant was convicted of the rape of a nine-year old boy. The victim testified that Dye, a family friend, said he would not be the victim's friend if the victim told someone about the abuse. The victim's mother had also told the victim that he was to mind the defendant and the defendant told the victim to keep the abuse a secret. The Ohio Supreme Court found this sufficient evidence of force to satisfy *R.C. 2907.02(B)* [**13] . The Court stated:

[*P32] [HN12] "Clearly, a child cannot be found to have consented to rape. However, in order to prove the element of force necessary to sentence the defendant to life imprisonment, the statute requires that some amount of force must be proven beyond that force inherent in the crime itself. Yet force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established. In fact, *R.C. 2907.02(B)* requires only that minimal force or threat of force be used in the commission of the rape." (Internal quotations and citations omitted.) *Id. at 327-28*.

[*P33] Here, the evidence established that Theresa feared Singleton and that she sought his approval. Theresa also testified that Singleton made her swear on the Bible that she would not tell anyone what had happened. The state presented evidence that Theresa had a learning disability. The state also presented testimony that on one occasion when Theresa refused to have sex with Singleton he became angry and ignored her until Theresa [**14] agreed to have sex with him. Thus, we cannot say that the findings that Singleton compelled Theresa to submit by force or threat of force are against the manifest weight of the evidence.

[*P34] After reviewing the records and considering the credibility of the witnesses, we cannot say that Singleton's convictions were against the manifest weight of the evidence. Singleton's first assignment of error is without merit.

[*P35] In his second assignment of error Singleton argues that the trial court erred by failing to instruct the jury on the affirmative defense of blackout on the sexual battery charge and by failing to instruct the jury that it was required to find that he acted recklessly to convict him for sexual battery. We disagree.

[*P36] [HN13] As a general rule, a trial court commits prejudicial error in a criminal case when it fails to give a proposed instruction when the instruction is relevant to the facts of the case, the instruction gives a correct statement of the relevant law, and the instruction is not covered in the

general charge to the jury. *City of Mentor v. Hamercheck (1996), 112 Ohio App. 3d 291, 296, 678 N.E.2d 622*. [HN14] Blackout is an affirmative [**15] defense that must be proved by a preponderance of the evidence. *State v. LaFreniere (1993), 85 Ohio App.3d 840, 848, 621 N.E.2d 812*. Here Singleton argues that he presented sufficient evidence to entitle him to an instruction on blackout.

[*P37] *R.C. 2901.21(A)* provides in relevant par:

[*P38] "***a person is not guilty of an offense unless both of the following apply:

[*P39] "***

[*P40] "(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense."

[*P41] Subsection (D)(2) provides:

[*P42] "As used in this section:

[*P43] "***

[*P44] "(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts."

[*P45] [HN15] Ohio's "blackout" instruction provides:

[*P46] "Where a person commits an act while unconscious as in a (coma) (blackout) (convulsion) due to (heart failure) (disease) (sleep) (injury), such act is not a criminal offense even though it would be a crime if such [**16] act were the product of a person's (will) (volition)." *4 Ohio Jury Instructions (1989) 60, Section 409.05*.

[*P47] Singleton presented evidence that he abused alcohol on a regular basis and that he suffered blackouts as a result. However, he failed to present evidence that he was blacked out at the time he committed sexual battery. [HN16] Evidence that a person was prone to abuse alcohol to the point of blackout is insufficient to warrant a jury instruction on this affirmative defense. There must be some evidence that the defendant was suffering from blackout at the time he committed the offense to warrant an instruction. *LaFreniere, at 848*, (stating, "in the majority of cases in which blackout has been invoked, the defendant has attempted to establish that he was unconscious at the time the act was committed.) See, also, *State v. Cutlip (June 15, 2001), 11th Dist. No. 99-L-149, 2001 Ohio App. LEXIS 2722, at 6, 2001 WL 687493*. Therefore, the trial court did not err in refusing to instruct on blackout.

[*P48] Singleton next argues that the trial court erred when it refused to instruct the jury that, to convict him on the charge of sexual battery, the state was required to [**17] prove that he acted recklessly. We disagree.

[*P49] *R.C. 2907.03(A)(5)* states:

[*P50] "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

[*P51] "***

[*P52] "(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person."

[*P53] *R.C. 2901.21(B)* states:

[*P54] [HN17] "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

[*P55] *R.C. 2907.03(A)(5)* does not specify any degree of culpability; therefore, we must determine whether it plainly indicates a purpose to impose strict liability. We hold that it does.

[*P56] *R.C. 2907.03(A)(1)-(4)* [HN18] states that liability [**18] is premised on the actor knowingly committing an act. The remaining subsections, five through eleven, do not specify any degree of culpability. [7] A review of the latter show that they are designed to protect those under the direct control or supervision of another, i.e., children and their parents, hospital or institutional patients, students. It seems clear that the legislature intended to impose strict liability in these instances to protect the most vulnerable members of society.

7 *R.C. 2907.03(A)* states:

[HN19] [*Pa] "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

[*Pb] "(1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

[*Pc] "(2) The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

[*Pd] "(3) The offender knows that the other person submits because the other person is unaware that the act is being committed.

[*Pe] "(4) The offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse.

[*Pf] "(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person.

[*Pg] "(6) The other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person.

[*Ph] "(7) The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of *section 3301.07 of the Revised Code*, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school.

[*Pi] "(8) The other person is a minor, the offender is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution.

[*Pj] "(9) The other person is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person.

[*Pk] "(10) The offender is a mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes.

[*Pl] "(11) The other person is confined in a detention facility, and the offender is an employee of that detention facility."

[**19] [*P57] Further, [HN20] because *R.C. 2907.03(A)(5)* requires the jury to find that specific factual conditions exist, i.e., immediate kinship, the legislature made clear its intent to impose strict liability. Finally, the statute is not ambiguous so we are not required to interpret it strictly against the state. Therefore, the trial court did not err when it failed to instruct the jury that the state was

required to prove that Singleton acted recklessly. *State v. Hannah (June 10, 1986), 10th Dist. No. 85AP-896, 1986 Ohio App. LEXIS 7120, 1986 WL 6682*. Appellant's second assignment of error is without merit.

[*P58] In his third assignment of error, Singleton argues that the trial court erred by failing to let him cross-examine Theresa regarding a prior, allegedly false, rape accusation. We find no error.

[*P59] During cross-examination, Singleton's attorney asked Theresa if she had ever made any false accusations of sexual activity. Theresa said she had not. The state objected and following a sidebar the court instructed the jury as follows:

[*P60] "Ladies and gentlemen, the last question that was asked of the witness regarding [**20] whether she had made a false accusation of sex was an inappropriate question and you are to disregard the question and answer. You may not use it for any purpose in your deliberations."

[*P61] Singleton argues that the trial court erred in prohibiting him from following up on Theresa's response and instructing the jury that the question was inappropriate.

[*P62] [HN21] The decision to admit or exclude evidence lies within the sound discretion of the trial court. We will reverse the trial court only when there has been an abuse of that discretion. *State v. Brazzon, 11th Dist. No. 2001-T-0050, 2003 Ohio 6088. At P 13*.

[*P63] In *State v. Boggs (1992), 63 Ohio St.3d 418, 588 N.E.2d 813*, the Ohio Supreme Court held:

[*P64] [HN22] "Where an alleged rape victim admits on cross-examination that she has made a prior false rape accusation, the trial judge shall conduct an *in camera* hearing to ascertain whether sexual activity was involved and, as a result, cross-examination on the accusation would be prohibited by *R.C. 2907.02(D)*, or whether the accusation was totally unfounded and therefore could be inquired into [**21] pursuant to *Evid.R. 608(B)*." Id. at paragraph two of the syllabus.

[*P65] [HN23] Assuming there is a good faith basis for the question, a defendant may ask a victim if he or she has made prior false accusations of sexual activity. Only if the victim responds affirmatively is the court required to conduct an in camera hearing to determine if the prior instances involved sexual activity. Therefore, Singleton's question was proper and the trial court should not have admonished the jury to disregard it. We now must determine whether this error prejudiced Singleton.

[*P66] Singleton argues that the trial court's admonition resulted in prejudice because the jury was led to believe that his counsel had done something improper. We find the error to be harmless.

[*P67] Through this line of questioning Singleton was attempting to show that Theresa's testimony was not credible. Theresa admitted during cross-examination that she had not been honest when investigators had initially questioned her about Singleton's abuse. Further, Kimberly testified that Theresa was not always honest. Given this testimony, we find any error in the admonition to the jury to have been [**22] harmless. Appellant's third assignment of error is without merit.

[*P68] In his fourth assignment of error, Singleton argues that the trial court's judgment labeling him a sexual predator was against the manifest weight of the evidence. We disagree.

[*P69] [HN24] For an offender to be adjudicated a sexual predator, the trial court must find, by clear and convincing evidence, that the offender has been convicted of a sexually oriented offense and that the offender is likely to engage in the future in one or more sexually oriented offenses. *R.C.*

2950.01(E)(1). See, also, *State v. Eppinger, 91 Ohio St.3d 158, 163, 2001 Ohio 247, 743 N.E.2d 881*.

[*P70] [HN25] When reviewing a sexual predator adjudication we must examine the record and determine whether the trier of fact had before it sufficient evidence to satisfy the burden of proof. *State v. Stillman (Dec. 22, 2000), 11th Dist. No. 2000-L-015, 2000 Ohio App. LEXIS 6106, at 1, 2000 WL 1876573*, citing *State v. Schiebel (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54*.

[*P71] In the instant case, Singleton does not challenge the trial court's finding that he has been convicted of a sexually [**23] oriented offense. He challenges the second prong of the test, i.e., the trial court's determination that he is likely to engage in the future in one or more sexually oriented offenses.

[*P72] [HN26] The Revised Code sets forth factors the trial court is to consider in determining whether an offender is likely to re-offend. These factors are: the offender's age; the victim's age; whether the offense involved multiple victims; whether the offender used drugs or alcohol to impair the victim of the offense or to prevent the victim from resisting; if the offender has previously been convicted of or pled guilty to a criminal offense, whether the offender completed the sentence imposed and, if the prior offense was a sex offense, whether the offender participated in programs available for sex offenders; any mental illness or mental disability of the offender; the nature of the sexual conduct with the victim and whether it was part of a demonstrated pattern of abuse; whether, during the commission of the offense, the offender displayed cruelty or made one or more threats of cruelty; and any additional behavioral characteristics that contribute to the offender's conduct. *Eppinger at* [**24] *164*.

[*P73] The state presented evidence that established that the victims were minors, that there were multiple victims, that Singleton used alcohol and drugs to impair the victims, that Singleton had a record of misdemeanor convictions for domestic violence and drug and alcohol offenses, that Singleton showed traits of pedophilia, psychopathy, personality disorder, and polysubstance abuse, that the conduct involved a pattern of abuse, and that Singleton displayed cruelty by verbal and physical intimidation.

[*P74] This evidence establishes by clear and convincing evidence that Singleton is likely to re-offend. Singleton's fourth assignment of error is without merit.

[*P75] In his fifth assignment of error Singleton argues that the trial court failed to follow the procedure set forth in *R.C. 2950.09*. We disagree.

[*P76] *R.C. 2950.09(B)(2)* provides in relevant part:

[*P77] "*** [HN27] At the hearing, the offender *** and the prosecutor shall have an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses regarding the determination [**25] as to whether the offender *** is a sexual predator. The offender *** shall have the right to be represented by counsel and, if indigent, the right to have counsel appointed to represent the offender ***."

[*P78] Singleton argues that he was not provided an expert witness and that he was not permitted to cross-examine the state's expert as required by the statute. The record does not indicate that Singleton requested that an expert witness be appointed for him, therefore, he has waived this argument. Further, the record reveals that Singleton was afforded the opportunity to call witnesses on his behalf. He declined to exercise his right to do so and stipulated to the report of the state's

expert. Therefore, we conclude that the trial court followed the procedure set forth in *R.C. 2950.09* and Singleton's fifth assignment of error is without merit.

[*P79] In his sixth assignment of error, Singleton contends that he was denied his right to a fair and impartial trial due to prosecutorial misconduct. We disagree.

[*P80] [HN28] "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, [**26] if so, whether they prejudicially affected substantial rights of the defendant." *State v. Smith (1984), 14 Ohio St.3d 13, 14, 14 Ohio B. 317, 470 N.E.2d 883*. We have held that:

[*P81] "'*** Unless the statement made by the prosecutor in argument to a jury is so misleading or untruthful that the defendant's rights are prejudiced, which deprives him of a fair and impartial trial, the claimed error cannot be considered prejudicial. In addition, in order to consider whether a prosecutor's statement in argument to a jury is prejudicial, one must consider the cumulative effect of the comments made to the jury.'" *State v. Daugert (June 29, 1990), 11th Dist. No. 89-L-14-091, 1990 Ohio App. LEXIS 2719, at 2, 1990 WL 94835*, quoting *State v. Muscatello (1977), 57 Ohio App. 2d 231, at 253-254, 387 N.E.2d 627*.

[*P82] Singleton initially argues that the prosecutor made improper references to his poor parenting skills. We have reviewed the allegedly improper statements and find them to be fair characterizations of the evidence presented.

[*P83] Singleton also argues that the prosecution misquoted Theresa's testimony and that this amounted to prosecutorial misconduct. During closing argument, [**27] the prosecutor quoted Theresa as testifying that Singleton had told Theresa, "I want you to look me in the eye and tell me that I did these things to you and then I want you to lie about it." Singleton objected. The court and counsel then reviewed Theresa's testimony and determined that the prosecutor had misquoted Theresa's testimony. The court then gave the following instruction to the jury:

[*P84] "During closing argument, the Prosecutor stated the testimony of Theresa Singleton 'when you come into Court, I want you to look me in the eye and tell me I did these things to you and then I want you to lie about it.'

[*P85] "The testimony reflected by the Court transcript states 'when he takes me to Court he is going to look me straight in the eye and ask me what I say is true and tell me I am lying.'

[*P86] "You are to disregard the above statement of the prosecutor as stated in closing argument and determine for yourselves the value of the testimony given."

[*P87] While the prosecutor clearly misquoted Theresa's testimony, we fail to see how this resulted in prejudice to Singleton. The trial court corrected the error by instructing the [**28] jury to disregard the misstatement of the prosecutor and by providing the jury with a correct statement of Theresa's testimony.

[*P88] Singleton also argues that the trial court erred in denying his motion for a mistrial based on prosecutorial misconduct. For the reasons discussed above, we find that the trial court did not err in denying Singleton's motion for mistrial. Appellant's sixth assignment of error is without merit.

[*P89] In his final assignment of error, Singleton argues that he was denied effective assistance of counsel. We disagree.

[*P90] [HN29] When we review an ineffective assistance claim, the benchmark is, "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington (1984), 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052*. [HN30] To prevail on his claim of ineffective assistance, Singleton must show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the *Sixth Amendment*." *Id. at 687*. He [**29] must also show prejudice resulting from the deficient performance. Id. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. Singleton must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id. at 694*. We presume that counsel's conduct was within the wide range of reasonable professional assistance. *Id. at 689*. See, also, *State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373*, at paragraphs two and three of the syllabus.

[*P91] We need not address the two prongs of appellant's ineffective assistance claim in the order set forth in *Strickland*.

[*P92] [HN31] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of [**30] lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland, at 697*.

[*P93] Singleton first argues that his trial counsel was ineffective because he failed to raise the affirmative defense of blackout. As discussed above, Singleton's trial counsel did seek an instruction on the affirmative defense of blackout but the trial court properly denied this instruction.

[*P94] Singleton also argues that his counsel was ineffective because he failed to present evidence at Singleton's sexual predator hearing. The record in this case establishes by clear and convincing evidence that the trial court properly labeled Singleton a sexual predator. Singleton argues that had his counsel retained an expert and presented evidence, 'the classification *could have been* different." (Emphasis added.) However, Singleton is required to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would have been* different. He has not done so.

[*P95] Finally, Singleton's counsel stipulated only to the admissibility of the state's expert report, not to labeling [**31] Singleton a sexual predator. Singleton's counsel argued those points of the state's expert report that indicated that Singleton was not likely to re-offend. Singleton has not demonstrated that he suffered prejudice because of his counsel's performance and his seventh assignment of error is without merit.

[*P96] The judgment of the Lake County Common Pleas Court is affirmed.

DONALD R. FORD, P.J., concurs,

WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

DISSENT BY: WILLIAM M. **O'NEILL**

DISSENT

WILLIAM M. O'NEILL, J., dissenting.

[*P97] I must respectfully dissent. I disagree with the majority's analysis of Singleton's third assignment of error.

[*P98] Recently, in *State v. Brazzon*, I noted the following in a dissenting opinion:

[*P99] "Child rape cases are of paramount importance. A child has alleged that an adult has committed terrible and unthinkable sexual acts with her. If true, a conviction and prison term is justified to protect potential victims and deter future offenses. However, if the allegations are untrue, an innocent individual may be sent to prison for the rest of his life. For this reason, it is essential [**32] that the trial court strictly adhere to the Rules of Evidence designed to afford both the accused and the victim a fair trial." [8]

8 *State v. Brazzon, 11th Dist. No. 2001-T-0050, 2003 Ohio 6088, at P72*,(O'Neill, J., dissenting).

[*P100] In Singleton's third assignment of error, he contends the trial court erred by not permitting cross-examination of the victim regarding prior false rape accusations. This issue creates a delicate balancing act. *R.C. 2907.02(D)*, Ohio's Rape Shield Statute, prohibits cross-examination of the alleged victim regarding prior sexual activity. Meanwhile, under *Evid.R. 608(B)*, a false rape accusation is a specific instance of conduct that is probative of the victim's credibility. The Supreme Court of Ohio has specifically addressed this issue in *State v. Boggs*. [9] If the prior accusation involved sexual activity, i.e., consensual sex, further cross-examination into the matter is barred by *R.C. 2907.02(D)* [**33] . [10] However, if the accusation is totally unfounded, then cross-examination may continue, at the trial court's discretion. [11] A problem with the *State v. Boggs* holding is that it is somewhat ambiguous as to the proper procedure to be followed by a trial court in these cases. I believe that ambiguity has contributed to the trial court's error in this matter.

9 *State v. Boggs (1992), 63 Ohio St.3d 418, 588 N.E.2d 813*.

10 Id. at paragraph two of the syllabus.

11 Id.

[*P101] As stated by the Supreme Court of Ohio:

[*P102] "Where an alleged rape victim admits on cross-examination that she has made a prior false rape accusation, the trial judge shall conduct an *in camera* hearing to ascertain whether sexual activity was involved and, as a result, cross-examination on the accusation would be prohibited by *R.C. 2907.02(D)*, or whether the accusation was totally unfounded and therefore could be inquired into pursuant to *Evid.R. 608(B)*." [12]

12 Id.

[**34] [*P103] The court further held, "if defense counsel inquires of an alleged rape victim as to whether she has made any prior false accusations of rape, and the victim answers no, the trial court would have the discretion to determine whether and to what extent defense counsel can proceed with cross-examination." [13]

13 *State v. Boggs, 63 Ohio St.3d at 421*.

[*P104] Contrary to what the trial court held, it is clear counsel *is* permitted to question the alleged victim as to whether she has made a prior false rape accusation.

[*P105] However, "before cross-examination of a rape victim as to prior false rape accusations may proceed, the trial judge *shall hold* an *in camera* hearing to ascertain whether such testimony involves sexual activity and thus is inadmissible under *R.C. 2907.02(D)*, or is totally unfounded and admissible for impeachment of the victim. It is within the sound discretion of the trial court, pursuant to *Evid.* [**35] *R. 608(B)*, whether to allow such cross-examination." [14]

14 (Emphasis added.) *Id. at 424*.

[*P106] Many courts have followed the holding in paragraph two of the syllabus in *State v. Boggs* and held that defense counsel is permitted to ask the initial question to the alleged victim of whether she has made a prior false accusation of rape. [15] The Eighth Appellate District has suggested that an in camera hearing is required prior to defense counsel asking the initial question on cross-examination. [16] Finally, other courts have permitted a trial court to conduct an in camera hearing prior to the initial question being asked if there is a motion by one of the parties. These motions have been filed by the prosecution [17] and by the defense. [18] Specifically, the Second Appellate District held that the in camera determination can be made before defense counsel is permitted to initially question the victim. [19]

15 See *State v. Netherland (1999), 132 Ohio App.3d 252, 262, 724 N.E.2d 1182*; *State v. Carr (June 3, 1993), 3d Dist. No. 17-92-21, 1993 Ohio App. LEXIS 2849, at *2-4*; *State v. Said* (Mar. 26, 1993), 11th Dist. No. 92-L-018, 1993 Ohio App. LEXIS 1751, at *8-9; *State v. Delozier* (Nov. 17, 1994), 10th Dist. No. 94APA02-250, 1994 Ohio App. LEXIS 5183, at *10-11 (regarding one of the allegedly false accusations); and *State v. McMillian (May 8, 1996), 1st Dist. No. C-950523, 1996 Ohio App. LEXIS 1821, at *17-19.*

[**36]

16 *State v. Garrett (Sept. 2, 1999), 8th Dist. No. 74759, 1999 Ohio App. LEXIS 4083, at *10-11*.

17 See *State v. Lampkin (Oct. 6, 1993), 9th Dist. No. 93CA005555, 1993 Ohio App. LEXIS 4885, at *3*; *State v. Villa, 2d Dist. No. 18868, 2002 Ohio 2939, at P60*.

18 See *State v. Moon, 5th Dist. No. 2002 CA 00028, 2002 Ohio 6850, at P11-12*; *State v. Delozier, 1994 Ohio App. LEXIS 5183, at *10-11* (regarding one of the allegedly false accusations).

19 *State v. Villa, 2002 Ohio 2939, at P61*.

[*P107] The majority opinion holds, "only if the victim responds affirmatively is the court required to conduct an in camera hearing to determine if the prior instances involved sexual activity." I disagree. "An *in camera* hearing is necessary independent of the witness' response." [20]

20 *State v. Smith (Nov. 8, 1995), 2d Dist. No. 94-CA-86, 1995 Ohio App. LEXIS 4960, at *13*, fn. 1, citing *State v. Boggs (1993), 89 Ohio App.3d 206, 211, 624 N.E.2d 204*.

[**37] [*P108] While Singleton was not permitted to introduce extrinsic evidence to support his claim during the trial, Singleton was permitted to introduce extrinsic evidence during the in camera hearing. [21] The Fourth Appellate District held, "it is difficult to imagine how a trial court could even make a fair and well-reasoned factual determination of whether the accusations involved 'sexual activity' without considering extrinsic evidence." [22] I agree.

21 *State v. Boggs, 89 Ohio App.3d at 211*; *State v. Smith, 1995 Ohio App. LEXIS 4960, at *13*, fn. 1.

22 *State v. Boggs, 89 Ohio App.3d at 211*.

[*P109] After a thorough analysis of *State v. Boggs* and subsequent interpretations, I would hold the following procedure is to be used when defense counsel wishes to cross-examine an alleged victim regarding alleged false accusation of rape. (1) At the discretion of the prosecutor or defense counsel, either party may move for an in camera [**38] hearing to admit (or exclude) cross-examination on this issue. (2) If neither party so moves, defense counsel is permitted to initially question the victim about prior false rape accusations. (3) Regardless of the victim's answer, the trial court would conduct an in camera hearing to determine whether the prior accusation involved sexual activity. Extrinsic evidence is permitted at the in camera hearing. (4) If the trial court determines the instance involved sexual activity, further inquiry is prohibited under *R.C. 2907.02(D)*. (5) If the trial court determines that the instance was totally unfounded, cross-examination of the victim may continue, at the trial court's discretion, pursuant to *Evid.R. 608*.

[*P110] During the in camera hearing in the case sub judice, defense counsel summarized the potential extrinsic evidence that would show the victim made a prior false rape accusation. However, the trial court summarily dismissed defense counsel's assertions without suggesting it would allow extrinsic evidence during the in camera hearing.

[*P111] Also, the trial court informed defense counsel that he needed to raise the issue with [**39] the court *prior* to initially asking the victim whether she had made a false accusation of rape. This is inconsistent with the Supreme Court of Ohio's holding in *State v. Boggs.* [23] Thereafter, the trial court informed the jury that the initial question was "inappropriate" and instructed the jury to disregard the question and answer.

23 *State v. Boggs, 63 Ohio St.3d 418, 588 N.E.2d 813*, paragraph two of the syllabus. See, also, the cases cited in fn. 15.

[*P112] Since the trial court did not permit the presentation of extrinsic evidence at the in camera hearing, it did not properly determine whether the allegedly false accusation involved sexual activity or was totally unfounded. Moreover, in light of the trial court's statements to the jury and its comments during the in camera hearing, the trial court concluded defense counsel was wrong in asking the initial question. Thus, I cannot say the trial court impartially considered whether to allow defense counsel to the opportunity to continue [**40] to cross-examine the victim regarding the allegedly false accusation. Accordingly, the trial court *abused* its discretion by not *exercising* its discretion.

[*P113] In addition, I do not agree with the majority's conclusion that this error was harmless. It is undisputed that the questioning was done to attack the victim's credibility. The majority notes that the victim's credibility was attacked through the testimony of her sister and the victim's admission that she was not initially honest with investigators. In light of these instances, I believe that the trial court's error in handling the false accusation issue cannot be deemed "harmless." Every time the defense can show that the alleged victim is dishonest decreases the probability that the jury will believe the victim's testimony regarding the underlying crime.

[*P114] Moreover, I do not believe every instance of dishonesty introduced at trial necessarily carries the same weight. For instance, evidence may be introduced suggesting that a teenager lied to her parents regarding her reason for breaking curfew. The jury could conclude that many teenagers lie to avoid getting into trouble, but still [**41] believe the individual's substantive testimony regarding the serious offense of rape. However, if it can be shown that the victim falsely accused another of rape, it may be more likely that the jury would question the victim's credibility regarding the instant rape accusation.

[*P115] Finally, Singleton was prejudiced by the jury hearing that his counsel had made an error when, in fact, he had not. The jury was led to believe defense counsel was out of line. Rather, defense counsel's actions were entirely consistent with the Supreme Court of Ohio's holding in *State v. Boggs.* The trial court was wrong to chastise defense counsel's actions, and, as a result, Singleton was prejudiced.

[*P116] Due to the improper evidentiary ruling of the trial court, I would reverse the judgment of the trial court and remand this matter for a new trial.

STATE OF OHIO, Plaintiff-Appellee, - vs - RAMON QUINONES, SR., Defendant-Appellant.

CASE NO. 2003-L-015

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

2005 Ohio 6576; 2005 Ohio App. LEXIS 5888

December 9, 2005, Filed

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Quinones, 2006 Ohio 1967, 2006 Ohio LEXIS 1035 (Ohio, Apr. 26, 2006)*

PRIOR HISTORY: [**1] Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 000428.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant's motion for competency determinations was granted as to victim one, who was found to be competent. His severance motion was denied. Defendant appealed his conviction by the Lake County Court of Common Pleas (Ohio) of gross sexual imposition and gross sexual imposition as a lesser included offense of rape, his classification as a sexually-oriented offender, and his three-year sentences on each count, to be served concurrently.

OVERVIEW: Defendant argued that his severance motion was improperly denied. The appellate court could not determine whether defendant's motion was properly renewed and could not find that counsel was ineffective for failing to do so. It was plain error to deny the motion to sever. To allow the evidence as to victim one to be introduced in a trial on victim two's allegations would violate *Ohio R. Evid. 404(B)* and vice versa. The jury could readily confuse the evidence regarding victim one's allegations with the evidence concerning victim two's allegations. Further, the charges were both sexual in nature and Ohio Rev. Code Ann. §§ 2907.02(D) and 2907.05(D) limited evidence of defendant's sexual history. The gross sexual imposition conviction, as a lesser included offense of rape, was supported by sufficient evidence. Victim one testified that defendant touched her for his own sexual gratification and her foster mother and a nurse testified that victim one described the touching to them. Finally, as the matter was remanded due to the improper joinder, the convictions could not stand. There were no convictions upon which the sexually-oriented offender adjudication claims could be addressed.

OUTCOME: The judgment of the trial court was reversed. The cause was remanded for separate trials.

CORE TERMS: joinder, sexual, assignments of error, prejudicial, touched, plain error, rape, indictment, admissible, touching, offender, sexual contact, renewal, renew, nurse, private part, prejudiced, manifest, detective, moot, separate trials, citations omitted, practitioner, competency, evidence presented, separately, severance, watching, severed, couch

LexisNexis(R) Headnotes

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Offenses
Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview
[HN1] The Court of Appeals of Ohio for the Ninth Appellate District has held that a motion for severance due to prejudicial misjoinder under rules of procedure for relief from prejudicial

misjoinder must be renewed at the close of the State's case or at the conclusion of all the evidence and unless made at that time, it is waived. The appellate court has continuously adhered to that rationale.

Constitutional Law > The Judiciary > Case or Controversy > Constitutional Questions > Necessity of Determination
[HN2] Courts decide constitutional issues only when absolutely necessary.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview
[HN3] Plain error does not exist unless, but for the error, the outcome at trial would have been different. Notice of plain error is to be taken only under exceptional circumstances and only to prevent a manifest miscarriage of justice.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Joinder of Offenses
[HN4] See *Ohio R. Crim. P. 8(A)*.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Joinder of Offenses
[HN5] Generally, joinder of offenses is liberally permitted in order to conserve judicial resources, prevent incongruous results in successive trials, or to diminish inconvenience to witnesses. Thus, the law generally favors joinder of multiple offenses in a single trial.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants
Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Offenses
[HN6] Pursuant to *Ohio R. Crim. P. 14*, it may be necessary to require separate trials to prevent prejudice.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants
Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Offenses
[HN7] See *Ohio R. Crim. P. 14*.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants
Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Offenses
[HN8] When a defendant claims that joinder is improper, he must affirmatively show that his rights have been prejudiced. *Ohio R. Crim. P. 14*. The accused must provide the trial court with sufficient information demonstrating that he would be deprived of the right to a fair trial if joinder is permitted.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Joinder of Offenses
Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Offenses
[HN9] The State may negate a defendant's claim of prejudice in the joinder of offenses by demonstrating either of the following: (1) that the evidence to be introduced relative to one offense would be admissible in the trial on the other, severed offense, pursuant to *Ohio R. Evid. 404(B)*; or (2) that, regardless of the admissibility of such evidence, the evidence relating to each charge is

simple and direct. The former is generally referred to as the "other acts test," while the latter is known as the "joinder test."

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Joinder of Offenses
Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Offenses
[HN10] Under the "joinder" test for the severance of offenses, the State is not required to meet the stricter "other acts" admissibility test, but is merely required to show that evidence of each crime joined at trial is simple and direct. The Supreme Court of Ohio continues to follow the "joinder test."

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Joinder of Offenses
Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Offenses
[HN11] According to the joinder test for the severance of offenses, the court must first determine whether the evidence presented for each offense would be admissible for the other offense, even if the counts were severed.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Joinder of Offenses
Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Offenses
[HN12] The second prong of the joinder test for the severance of offenses is, if the evidence is not properly admissible for both offenses, whether the evidence itself is simple and direct--meaning the evidence of each offense is so clearly separate and distinct as to prevent the jury from considering evidence of each victim's accusations as corroborative of the other.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
Evidence > Relevance > Prior Acts, Crimes & Wrongs
[HN13] The Supreme Court of Ohio has noted that Ohio Rev. Code Ann. §§ 2907.02(D) and 2907.05(D), the statutes for rape and gross sexual imposition, respectively, both specifically limit evidence of a defendant's sexual history.

Evidence > Relevance > Prior Acts, Crimes & Wrongs
[HN14] There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition. Yet in the ordinary affairs of life such a disposition is a convincing factor, and its exclusion is rather because the issue is practically unmanageable than because it is not rationally relevant. When the accused's conduct on several separate occasions can properly be examined in detail, the objection disappears, and the only consideration is whether the trial as a whole may not become too confused for the jury.

Criminal Law & Procedure > Double Jeopardy > Double Jeopardy Protection > Acquittals
Evidence > Procedural Considerations > Weight & Sufficiency
[HN15] Should the appellate court find merit in a defendant's sufficiency of the evidence argument, the State is barred from retrying the defendant on double jeopardy grounds.

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence
Evidence > Procedural Considerations > Weight & Sufficiency
[HN16] When determining whether there is sufficient evidence presented to sustain a conviction, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
[HN17] See *Ohio Rev. Code Ann. § 2907.05(A).*

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
[HN18] See Ohio Rev. Code Ann. § 2907.01(B).

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > General Overview
Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview
[HN19] Gross sexual imposition is a lesser included offense of rape.

COUNSEL: Charles E. Coulson, Lake County Prosecutor, and Amy E. Cheatham, Assistant Prosecutor, Painesville, OH, (For Plaintiff-Appellee).

Robert F. DiCello, Mentor, OH, (For Defendant-Appellant).

JUDGES: WILLIAM M. O'NEILL, J. ROBERT A. NADER, J., Ret., Eleventh Appellate District, sitting by assignment, concurs, DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

OPINION BY: WILLIAM M. **O'NEILL**

OPINION

WILLIAM M. O'NEILL, J.

[*P1] This appeal arises from the Lake County Court of Common Pleas, wherein appellant, Ramon Quinones, Sr. ("Quinones"), was found guilty of four counts of gross sexual imposition.

[*P2] The charges in this case arose from allegations of improper sexual contact between Quinones and his nine-year-old granddaughter, "M.," and allegations of sexual conduct and sexual contact with "J.," the eight-year-old daughter of his previous girlfriend. The following facts were presented at trial.

[*P3] During the relevant time period, J. was living with her foster mother, Peggy Howe, in Boardman, Ohio. J. would have periodic visits with her biological mother, Bobbi Jo, [**2] who resided in Painesville, Ohio. Bobbi Jo was dating Quinones, and he would periodically stay overnight, including during the times when J. was visiting.

[*P4] Sometime in the Fall of 2000, J., her brother, Billy, and Quinones were staying at Bobbi Jo's house. J. and Billy were watching television in the living room when Quinones entered. Quinones sat down on the couch next to J. and covered her with a blanket. J. testified that Quinones then began fondling her "private part" under the blanket, eventually digitally penetrating her. J. also testified that the following morning she was in the kitchen eating breakfast with Billy, when Quinones came down wearing only pajama pants. She testified that she was standing up and Quinones approached her from behind and rubbed her shoulders.

[*P5] J. also testified that she told Howe of other instances of inappropriate touching. Howe testified that on January 15, 2001, J. awoke at 4:00 a.m. with a nightmare. She came to Howe and told her that Quinones had touched her and tried to digitally penetrate her.

[*P6] The state also presented testimony from Janet Gorsuch, a nurse practitioner with the Tri-County Child Advocacy Center, [**3] who examined J. The examination was performed pursuant to a request by Sergeant Troy Hager of the Painesville Police Department. Ms. Gorsuch began explaining to J. why she was conducting the examination, and J. immediately stated that Quinones had touched her private area. Specifically, she told the nurse that Quinones had rubbed his penis against her anal area while she had her clothes on, Quinones had rubbed her "private part" while she was sitting on the couch, and that his penis was sticking out at that time. As a result of the allegations, J.'s visitations with her mother were terminated.

[*P7] Sergeant Hager spoke with Quinones after J.'s allegations were brought forth. Quinones stated he remembered the last time J. and Billy visited but denied any improper touching. He admitted that he liked to tickle the children but never touched J. or Billy in a sexual manner.

[*P8] The second victim, Quinones' granddaughter, M., testified that she was at Quinones' house around Christmas of 1999. She was watching a movie alone in the living room when Quinones came into the room. She testified that, after watching the movie for a few minutes, Quinones began rubbing her thigh and [**4] then touched her "private part" between her legs.

[*P9] On another occasion in the Summer of 2000, Quinones drove M. to a neighborhood store to buy candy for her and her brothers. She testified that during the drive Quinones rubbed her thigh and her "private parts."

[*P10] M. eventually told her mother what happened. In addition to these incidents, M. told her mother that Quinones told her that he was going to have sex with M. when she turned ten years old.

[*P11] After M.'s allegations, Quinones was again interviewed by the Painesville Police Department, this time by Detective Robert Sayer. During that conversation, Quinones stated that whenever his grandchildren were around he liked to play with them and tickle them. He stated the touching was playful and never sexual in nature. He said that perhaps he "loved on them too much." Quinones denied telling M. that he was going to have sex with her when she turned ten years old.

[*P12] On September 7, 2001, Quinones was secretly indicted on three counts of gross sexual imposition, third-degree felonies, in violation of *R.C. 2907.05(A)(4)*, and one count of rape, a first-degree felony, in [**5] violation of *R.C. 2907.02(A)(1)(b)*. Counts one and two, charging gross sexual imposition, pertained to the allegations asserted by M. Counts three and four, charging rape and gross sexual imposition, pertained to J.'s allegations.

[*P13] On March 11, 2002, Quinones filed a motion for a competency determination of both M. and J. Within that motion was a request for an order prohibiting the prosecutor, his agents,

advocates, and the parents of the children from rehearsing the children prior to the competency hearings. Quinones also filed a motion seeking relief from prejudicial joinder on that same date, requesting the four-count indictment be severed and two separate trials be ordered.

[*P14] The trial court conducted an in-chambers hearing on both of Quinones' motions. At the conclusion of that hearing, the trial court denied Quinones' motion for relief from prejudicial joinder. The court also found that Quinones raised sufficient issues to require a competency evaluation of J., but that he had not sufficiently met his burden regarding M. Moreover, the trial court denied Quinones' order prohibiting the rehearsal of the witnesses prior to the competency [**6] determination. A competency hearing was held for J., at the conclusion of which the trial court determined that J. was competent to testify.

[*P15] On May 20, 2002, the state filed a motion to amend the indictment, requesting that the dates in counts three and four be amended. The trial court granted the motion to amend. Also on May 20, 2002, Quinones filed a motion to reconsider relief from prejudicial joinder. The state filed its response. The trial court denied Quinones' motion on July 8, 2002, basing its decision on the Supreme Court of Ohio's holding in *State v. Schaim*. [1]

1 *State v. Schaim (1992), 65 Ohio St.3d 51, 1992 Ohio 31, 600 N.E.2d 661*.

[*P16] On June 20, 2002, Quinones filed a motion to compel amendment of the indictment, or in the alternative, a motion for a bill of particulars. The state filed a bill of particulars on July 3, 2002. On July 22, 2002, Quinones filed a notice of alibi, asserting that he was in Puerto Rico during the times the state alleged the offenses occurred.

[*P17] [**7] A jury trial commenced September 30, 2002. After deliberating, the jury found Quinones guilty of the three counts of gross sexual imposition. The jury found Quinones not guilty of rape, but found him guilty of a lesser included offense, to-wit: gross sexual imposition. Sentencing was deferred at that time, and the matter was referred for a presentence investigation and psychological evaluation in contemplation of a sexual-predator-adjudication hearing.

[*P18] On December 16, 2002, the trial court conducted a sexual-predator-adjudication hearing and the sentencing hearing. The state called Dr. John Fabian to testify regarding his psychological evaluation of Quinones. Dr. Fabian concluded that Quinones presented a low to moderate risk of reoffending in the future. The trial court subsequently concluded that it did not find, by clear and convincing evidence, that Quinones was a sexual predator, but it did find that Quinones was a sexually-oriented offender. The court explained to Quinones his reporting duties. At the conclusion of the sexual-predator hearing, the trial court proceeded to sentencing. Quinones was sentenced to three years imprisonment on each of the four counts of [**8] gross sexual imposition, to be served concurrently.

[*P19] Quinones subsequently filed this appeal, presenting seven assignments of error:

[*P20] "[1.] The conviction was not supported by sufficient evidence.

[*P21] "[2.] The conviction stands against the manifest weight of the evidence.

[*P22] "[3.] The trial court's conclusion that defendant is a sexually oriented offender is against the manifest weight of the evidence.

[*P23] "[4.] Renewal of motion in opposition to joinder is not required by the Criminal Rules nor does the Ohio Supreme Court or United States Supreme Court hold that renewal is mandatory; therefore a judge-made rule requiring renewal is not mandated under existing law and violates due process as guaranteed by the *Fourteenth Amendment to the United States Constitution* as well as *Article IV Section 5(B) of the Ohio Constitution.*

[*P24] "[5.] Assuming arguendo that counsel was properly required to renew defendant's motion for relief from prejudicial joinder, counsel for defendant provided ineffective assistance of counsel when said counsel failed to renew defendant's motion.

[*P25] "[6.] The trial court committed [**9] plain error when it denied defendant's motion for relief from prejudicial joinder, because appellant was prejudiced by the joinder.

[*P26] "[7.] It was error for the trial court to apply the 'joinder test,' as said test violates defendant's right to due process as guaranteed by the *Fourteenth Amendment to the United States Constitution*."

[*P27] For the purpose of clarity of analysis, we will address Quinones' assignments of error out of sequential order.

[*P28] We will address Quinones' fourth and fifth assignments of error together. In his fourth assignment of error, Quinones contends that the criminal rules do not require a renewal of a motion in opposition to joinder in order to prevent a waiver of his right to assert the claimed error on appeal. In addition, he asserts that the case law requiring such a renewal is unconstitutional. In his fifth assignment of error, Quinones argues that his trial counsel was ineffective in failing to renew his motion for relief from prejudicial joinder if, in fact, this court determines that renewal was required.

[*P29] In *State v. Owens*, [HN1] the Ninth Appellate District held that "[a] motion for severance due to prejudicial [**10] misjoinder under rules of procedure for relief from prejudicial misjoinder must be renewed at the close of the state's case or at the conclusion of all the evidence and unless made at that time, it is waived." [2] This court has continuously adhered to that rationale. [3]

2 *State v. Owens (1975), 51 Ohio App.2d 132, 366 N.E.2d 1367,* at paragraph two of the syllabus.

3 *State v. Cannon (June 30, 1999), 11th Dist. No. 98-L-032, 1999 Ohio App. LEXIS 3057, at *11*; *State v. Brady (1988), 48 Ohio App.3d 41, 44, 548 N.E.2d 278*; *State v. Daniels (Dec. 23, 1994), 11th Dist. No. 92-T-4730, 1994 Ohio App. LEXIS 5900, at *12-13* (overruled on other grounds).

[*P30] The transcript in this matter does not indicate whether Quinones' trial counsel renewed the motion after the state's case-in-chief. At the conclusion of the state's case-in-chief, the transcript indicates "the Court and counsel conferred at the bench, out of the hearing of the jury and this reporter." Following the [**11] discussion, defense counsel, the assistant prosecutor, and the trial court all generically mentioned the "motions" that had been discussed, but did not identify what the motions were.

[*P31] Since we do not know whether Quinones' trial counsel renewed his motion for relief from prejudicial joinder after the state's case-in-chief, we cannot conclude he was ineffective for failing to do so. In addition, since we are uncertain whether the motion was renewed, and since Quinones raises ineffective assistance of counsel and plain error arguments in relation to this issue, we ultimately address the merits of Quinones' motion for relief from prejudicial joinder. Therefore, in light of our subsequent analysis of Quinones' sixth assignment of error, his fourth assignment of error is moot, because [HN2] ""courts decide constitutional issues only when absolutely necessary."" [4]

4 (Citations omitted.) *State ex rel. Mason v. Griffin, 104 Ohio St.3d 279, 2004 Ohio 6384, at P20, 819 N.E.2d 644*.

[*P32] Quinones' fourth [**12] assignment of error is moot, and his fifth assignment of error is without merit.

[*P33] In his sixth assignment of error, Quinones contends that the trial court committed plain error when it denied his motion for relief from prejudicial joinder. In essence, Quinones argues that if renewal of his motion for relief from prejudicial joinder was required and his trial counsel failed to renew it, the trial court committed plain error in denying his motion. As noted, based on the record before us, we are unable to determine whether Quinones did, in fact, renew his motion for relief from prejudicial joinder. However, even if he did not renew the motion, we conclude the trial court's error rises to the level of plain error, therefore, we will address Quinones' argument on this more stringent standard.

[*P34] [HN3] "Plain error does not exist unless, but for the error, the outcome at trial would have been different." [5] Notice of plain error is to be taken only under exceptional circumstances and only to prevent a manifest miscarriage of justice. [6]

5 (Citations omitted.) *State v. Jenks (1991), 61 Ohio St.3d 259, 282, 574 N.E.2d 492*.

[**13]

6 *State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804*, paragraph three of the syllabus.

[*P35] Pursuant to *Crim.R 8(A)*, [HN4] "two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character ***." [HN5] Generally, joinder of offenses is liberally permitted in order to conserve judicial resources, prevent incongruous results in successive trials, or to diminish inconvenience to witnesses. [7] Thus, the law generally favors joinder of multiple offenses in a single trial. [8]

7 *State v. Torres (1981), 66 Ohio St.2d 340, 343, 421 N.E.2d 1288*.

8 *State v. Daniels, supra, at *13*.

[*P36] However, [HN6] pursuant to *Crim.R. 14*, it may be necessary to require separate trials to prevent prejudice. [9] *Crim.R. 14* [**14] reads, in pertinent part:

9 *State v. Brinkley, 105 Ohio St. 3d 231, 2005 Ohio 1507, at P29, 824 N.E.2d 959*.

[*P37] [HN7] "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(A)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial."

[*P38] [HN8] When a defendant claims that joinder is improper, he must affirmatively show that his rights have been prejudiced. [10] The accused must provide the trial court with sufficient information demonstrating that he would be deprived of [**15] the right to a fair trial if joinder is permitted. [11]

10 See *Crim.R. 14*; *State v. Roberts (1980), 62 Ohio St.2d 170, 175, 405 N.E.2d 247*.

11 *State v. Lott (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293*.

[*P39] [HN9] The state may negate the defendant's claim of prejudice by demonstrating either of the following: (1) that the evidence to be introduced relative to one offense would be admissible in the trial on the other, severed offense, pursuant to *Evid.R. 404(B)*; or (2) that, regardless of the admissibility of such evidence, the evidence relating to each charge is simple and direct. [12] The former is generally referred to as the "other acts test," while the latter is known as the "joinder test." [13]

12 *State v. Franklin (1992), 62 Ohio St.3d 118, 122, 580 N.E.2d 1*.

13 *State v. Lott, supra, at 163.*

[**16] [*P40] In *State v. Lott*, the Supreme Court of Ohio held that [HN10] under "the 'joinder' test, the state is not required to meet the stricter 'other acts' admissibility test, but is merely required to show that evidence of each crime joined at trial is simple and direct." [14] We note the Supreme Court of Ohio continues to follow the "joinder test," as outlined in *State v. Lott.* [15]

14 *Id.*

15 *State v. Brinkley, 2005 Ohio 1507, at P30*, citing *State v. Lott, 51 Ohio St.3d at 163*.

[*P41] In considering whether Quinones was prejudiced by the joinder of charges, the trial court must first determine whether the evidence of the other crime would be admissible, even if the counts were severed. [16]

16 *State v. Hamblin (1988), 37 Ohio St.3d 153, 159, 524 N.E.2d 476*.

[*P42] In the instant [**17] case, the state presented testimony at trial from both children, as well as Howe, Sergeant Hager, Detective Sayer, and Ms. Gorsuch. Howe, J.'s foster mother, was the state's first witness. Howe testified as to J.'s visitation schedule with her mother during that time and the nightmare incident. J. was the state's second witness. She testified about the incident on the couch where Quinones touched her "private part" and digitally penetrated her.

[*P43] The state then called Sergeant Hager of the Painesville Police Department. He testified that he was assigned to investigate J.'s allegations sometime between January 17 and 19, 2001. He testified regarding his interviews with J. and Quinones, as well as the report he received from nurse practitioner Gorsuch, which indicated "basically the child has suffered some sort of sexual injury to her vaginal lining."

[*P44] M., Quinones' granddaughter, was next to testify. She testified about the incident that occurred around Christmas of 1999 and the car ride incident that occurred on June 30, 2000. On cross-examination, M. admitted to making a complaint against another elderly individual on June 29, 2000, for conduct that occurred [**18] on June 26 or 27, 2000. This complaint similarly alleged the other man touched her inappropriately during a car ride.

[*P45] The state then called Detective Sayer to the stand. He was the detective assigned to investigate M.'s allegations. Although he was not working on J.'s case, Detective Sayer testified regarding the statement he took from Quinones and whether Quinones informed him he was out of town during the time period when J. alleged Quinones touched her. The final witness for the state was Nurse Practitioner Gorsuch. She testified about the facts and circumstances surrounding J.'s examination and her subsequent medical conclusions.

[*P46] After the state rested, the defense presented the testimony of Patrolman Eric Miller, who had taken M.'s statement. Miller testified that when he interviewed M. she made no allegations of physical touching by Quinones. The defense then called Ricardo Quinones, Quinones' son, to the stand. He testified regarding Quinones' alibi evidence. Specifically, he had driven Quinones to the airport on September 22, 2000, to embark on a trip to Puerto Rico. He testified that he, himself, left for Puerto Rico on December 18, 2000, and stayed [**19] there with Quinones until December 26, 2000, when the two returned together.

[*P47] Looking at the substance and the nature of the testimony presented at trial, we conclude that the trial court erred in not ordering a severing of the indictment and separate trials. [HN11] According to the joinder test, the court must first determine whether the evidence presented for each offense would be admissible for the other offense, even if the counts were severed. In this case, the

answer is clearly no. The evidence regarding the investigation and evaluation of J.'s allegations of abuse, which occurred at a wholly different time period and involved a separate set of circumstances, would not be admissible evidence in relation to M.'s allegations. We also find the reverse to be true. To allow this evidence to be introduced in either trial would be a violation of *Evid.R. 404(B)* regarding prior bad acts. There is no distinct pattern of abuse or relationship to the offenses that would permit the overlapping of the evidence.

[*P48] [HN12] The second prong of the joinder test is, if the evidence is not properly admissible for both offenses, whether the evidence itself is simple [**20] and direct -- meaning the evidence of each offense is so clearly separate and distinct as to prevent the jury from considering evidence of each child's accusations as corroborative of the other. [17] We conclude the answer here is no as well. Once the jury is presented with testimony regarding alleged abuse from one child, as well as that child's foster parent, the investigating officer, and the nurse practitioner who provided the medical examination, the jury is then asked to, in essence, "disregard" all that testimony and start fresh with new allegations of abuse regarding a second child with another investigation.

17 See *State v. Brinkley, 2005 Ohio 1507, at P37*; *State v. Lott, 51 Ohio St.3d at 164*.

[*P49] Moreover, we note the allegations of each child are similar in nature. While the evidence is not so similar as to be admissible under *Evid.R. 404(B)* for proof of motive, plan, or intent, it is not "simple and direct." Both victims were young [**21] females. Both children allege that Quinones inappropriately touched them on their "private parts." Both children described an incident that took place on a couch, while watching television or a movie. The jury could readily confuse the evidence regarding J.'s allegations with the evidence suggesting Quinones inappropriately touched M.

[*P50] Also, the presentation of witnesses further mingled the evidence in this matter. Initially, the state presented Howe, J., and Sergeant Hager all in relation to the allegations of abuse of J. Then, the state called M. and Detective Sayer regarding the alleged abuse to M. Thereafter, the state returned to the allegations of abuse to J., by calling Nurse Practitioner Gorsuch. Next, the defense called Patrolman Miller to testify that M. did not mention that Quinones touched her during the interview. Finally, the focus shifted back to J.'s allegations, when the defense called Ricardo Quinones as an alibi witness for the time frame J. alleged Quinones touched her. The continual change of attention from J.'s and M.'s respective allegations against Quinones created an extremely difficult task, at best, for a jury to keep the allegations separate [**22] when rendering the verdicts.

[*P51] Finally, the fact that these charges were both sexual in nature weighs against joinder in a single trial. [18] In *State v. Schaim*, [HN13] the Supreme Court of Ohio noted that *R.C. 2907.02(D)* and *R.C. 2907.05(D)*, the statutes for rape and gross sexual imposition, respectively, both specifically limit evidence of the defendant's sexual history. [19]

18 See, e.g., *State v. Schaim, 65 Ohio St.3d at 60-63*.

19 Id.

[*P52] The evidence presented to a single jury had a cumulative effect and acted as corroborating evidence for two unrelated allegations of abuse, in violation of *Evid.R. 404(B)*. In addition, the evidence presented by the state was not simple and direct; rather, it tended to blur together, due to the similarity of the allegations. This constituted reversible error, as it prevented the jury from being able to reach separate, distinct conclusions regarding each offense.

[**23] [*P53] As noted by Quinones in his brief to this court, the keen observations of Judge Learned Hand regarding the inherent peril in trying multiple crimes together are highly relevant in this case:

[*P54] [HN14] "There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition. Yet in the ordinary affairs of life such a disposition is a convincing factor, and its exclusion is rather because the issue is practically unmanageable than because it is not rationally relevant. When the accused's conduct on several separate occasions can properly be examined in detail, the objection disappears, and the only consideration is whether the trial as a whole may not become too confused for the jury." [20]

20 *U.S. v. Lotsch (C.A.2, 1939), 102 F.2d 35, 36*.

[**24] [*P55] Therefore, we conclude the trial court committed plain error in denying Quinones' motion for relief from prejudicial joinder.

[*P56] The sixth assignment of error is with merit.

[*P57] In his seventh assignment, Quinones asserts that the trial court erred in applying the "joinder test," in violation of his *Fourteenth Amendment* due process rights. Quinones argues in his seventh assignment that the "joinder test" is "bad law," as it undermines a defendant's due process rights and misapplies the federal case law upon which it is based. Specifically, Quinones argues that joinder of offenses necessarily involves the admission of prior bad acts in contravention of *Evid.R. 404(B)*.

[*P58] As was the case with Quinones' fourth assignment of error, in light of our analysis of his sixth assignment of error, his seventh assignment of error is moot, because """courts decide constitutional issues only when absolutely necessary.""" [21]

21 (Citations omitted.) *State ex rel. Mason v. Griffin, 2004 Ohio 6384, at P20*.

[**25] [*P59] Quinones' seventh assignment of error is moot.

[*P60] In his first assignment of error, Quinones contends that his conviction of gross sexual imposition, as a lesser included offense of rape, was not supported by sufficient evidence. [HN15]

Should we find merit in Quinones' sufficiency argument, the state would be barred from retrying Quinones on double jeopardy grounds. [22]

22 *State v. Freeman (2000), 138 Ohio App.3d 408, 424, 741 N.E.2d 566*, citing State *v. Thompkins (1997), 78 Ohio St.3d 380, 387, 1997 Ohio 52, 678 N.E.2d 541*.

[*P61] [HN16] When determining whether there is sufficient evidence presented to sustain a conviction, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." [23]

23 *State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492*, paragraph two of the syllabus.

[**26] [*P62] *R.C. 2907.05(A)* governs the crime of gross sexual imposition, and provides:

[*P63] "(A) [HN17] No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

[*P64] "***

[*P65] "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

[*P66] *R.C. 2907.01(B)* defines sexual contact as follows:

[*P67] "(B) [HN18] 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

[*P68] Quinones contends that J. testified that he only touched her outside her vagina in trying to digitally penetrate her and this act of rape was the only evidence from which the jury could conclude that Quinones had sexual contact with J. Quinones also asserts [**27] that since the jury acquitted him of the rape count, it must also have acquitted him of the gross sexual imposition charge. We disagree.

[*P69] The state had to prove beyond a reasonable doubt that Quinones' specific intent in touching J. on proscribed areas of her body was for sexual arousal or gratification of either himself or the victim. [24] It must be determined whether an ordinarily prudent person or a reasonable person sitting as a juror would perceive from Quinones' conduct, and all of the surrounding circumstances, that his purpose was arousal or gratification. Also, [HN19] gross sexual imposition is a lesser included offense of rape. [25] J. clearly testified that Quinones touched her for his own sexual gratification. Howe also testified regarding the touching that J. described to her. Nurse Gorsuch also testified that J. described Quinones' touching.

24 *State v. Mundy (1994), 99 Ohio App.3d 275, 287, 650 N.E.2d 502*.

25 *State v. Johnson (1988), 36 Ohio St.3d 224, 522 N.E.2d 1082*, paragraph one of the syllabus.

[**28] [*P70] We conclude that, based on the foregoing, the state provided sufficient evidence for the jury to find beyond a reasonable doubt that Quinones touched J. on the proscribed areas of her body for his own sexual gratification.

[*P71] The first assignment of error is without merit.

[*P72] In his second and third assignments of error, Quinones contends that both his convictions and the sexually-oriented offender adjudication are against the manifest weight of the evidence.

[*P73] As mentioned in our foregoing analysis, the trial court erred in denying Quinones' motion for relief from prejudicial joinder. As such, the matter is to be remanded, and the resulting convictions cannot stand. Similarly, because there are no sexually-oriented convictions upon which the sexually-oriented offender adjudication is based, Quinones' assignment of error relating to that adjudication cannot be addressed by this court at this time. [26] Therefore, based on the foregoing, Quinones second and third assignments of error are moot.

26 *R.C. 2950.01(D).*

[**29] [*P74] We have concluded that Quinones' sixth assignment of error has merit, the second, third, fourth, and seventh assignments of error are moot, and his first and fifth assignments of error are without merit. Thus, based on the foregoing, the judgment of the trial court is reversed, and the cause is remanded for separate trials.

ROBERT A. NADER, J., Ret., Eleventh Appellate District, sitting by assignment, concurs,

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

DISSENT BY: DIANE V. GRENDELL

DISSENT

DIANE V. GRENDELL, J., dissenting.

[*P75] I respectfully dissent.

[*P76] By failing to renew his motion for severance due to prejudicial joinder of offenses at the close of the state's case or at the close of all the evidence, Quinones has waived all but plain error. *State v. Stephens (Dec. 23, 1999), 4th Dist. No. 98CA41, 1999 Ohio App. LEXIS 6294, at *6* (citations omitted); *State v. Range (Sept. 30, 1997), 2nd Dist. No. 15301, 1997 Ohio App. LEXIS 4474, at *9* (citation omitted). Plain error is to be invoked "only under exceptional circumstances to prevent a manifest miscarriage of justice." *State v. Phillips, 74 Ohio St.3d 72, 83, 1995 Ohio 171, 656 N.E.2d 643,* [**30] citing *State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804*. In other words, there is no plain error unless "the outcome of the trial *clearly* would have been" different in the absence of the error. *Long, 53 Ohio St.2d at 97* (emphasis added).

[*P77] Since the three counts of sexual imposition and the one count of rape were "of the same or similar character," joinder was proper, *Crim.R. 8(A)*, unless Quinones was "prejudiced by [the] joinder of offenses." *Crim.R. 14*. Quinones bore the burden to affirmatively demonstrate the requisite prejudice. *State v. Wiles (1991), 59 Ohio St.3d 71, 76, 571 N.E.2d 97* (citation omitted). To do so, Quinones "must demonstrate that the trial court abused its discretion" in joining the offenses. *State v. Lott (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293*. The state can negate a defendant's prejudice claim either by demonstrating that evidence of the other crimes would be admissible pursuant to the Rules of Evidence or by showing that the evidence pertaining to each separate crime joined at trial was simple and direct. Id. (citations omitted).

[*P78] In this case, the [**31] evidence introduced as to each charge was simple and direct. The state introduced evidence, including testimony from Maria, regarding the two counts of gross sexual imposition of Maria. The state *separately* introduced evidence, including testimony from Jessica, regarding the one count of gross sexual imposition and the one count of rape of Jessica. Thus, the evidence pertaining to each victim clearly was separate and distinct. See *Wiles, 59 Ohio St.3d at 77*.

[*P79] Moreover, the trial court instructed the jury to "consider each count and evidence applicable to each count separately" and to be "uninfluenced by your verdict as to the other counts." Since it is presumed that a jury will follow the instructions given by the trial court, *State v. Murphy (1992), 65 Ohio St.3d 554, 584, 605 N.E.2d 884* (citations omitted), "we may presume that the jury considered each count and the evidence applicable to each count separately." *State v. Tackett (May 26, 1998), 12th Dist. No. CA97-08-158, 1998 Ohio App. LEXIS 2274, at * 6*.

[*P80] Since the evidence pertaining to each victim was separate, distinct and uncomplicated, and since the court specifically [**32] instructed the jury to separately consider the charges, a reasonable juror could "easily differentiate between the counts of the indictment." *Id. at *5*. In fact, the jury's ability to separate the charges in this matter is demonstrated by its not guilty verdict on one of the charges. See *Wiles, 59 Ohio St.3d at 77*; *State v. Smith (Sept. 30, 1993), 11th Dist. No. 91-T-4610, 1993 Ohio App. LEXIS 4793, at *21*. Thus, Quinones was not prejudiced by the joinder of offenses. See *Wiles, 59 Ohio St.3d at 77*; *Tackett, 1998 Ohio App. LEXIS 2274, at *5-6*; *State v. Sexton (Mar. 9, 1998), 5th Dist. Nos. 1996CA00306, 1996CA00367, 1998 Ohio App. LEXIS 1302, at *12-13*; *State v. Wyatt (Jan. 10, 1994), 12th Dist. No. CA93-03-050, 1994 Ohio App. LEXIS 17, at *14-15*; *Smith, 1993 Ohio App. LEXIS 4793, at *20-21*.

[*P81] It is, therefore, clear that this case does not present an exceptional circumstance where we should apply plain error to prevent a manifest miscarriage of justice. Thus, the majority's invocation of plain error is misplaced.

[*P82] For the reasons stated above, [**33] I would affirm the judgment of the trial court below.

STATE OF OHIO, Plaintiff-Appellee, - vs - JERRY BUTCHER, Defendant-Appellant.

CASE NO. 2005-A-0033

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, ASHTABULA COUNTY

170 Ohio App. 3d 52*; *2007 Ohio 118*; *866 N.E.2d 13*; *2007 Ohio App. LEXIS 111

January 12, 2007, Decided

SUBSEQUENT HISTORY: Stay granted by *State v. Butcher, 112 Ohio St. 3d 1489, 2007 Ohio 724, 862 N.E.2d 116, 2007 Ohio LEXIS 490 (2007)*
Discretionary appeal not allowed by *State v. Butcher, 113 Ohio St. 3d 1489, 2007 Ohio 1986, 2007 Ohio LEXIS 1018 (Ohio, May 2, 2007)*

PRIOR HISTORY: Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 03 CR 430.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Following a jury trial, the Ashtabula County Court of Common Pleas (Ohio) convicted defendant of three counts of rape, in violation of *R.C. § 2907.02*, and two counts of kidnapping, in violation of *R.C. § 2905.01*, first-degree felonies. The kidnapping counts were merged with the rape counts. He was sentenced to three life terms in prison, to be served concurrently. Defendant appealed.

OVERVIEW: Defendant argued that the trial court erred in admitting hearsay statements. The appellate court held that defendant did not receive a fair trial due to the numerous hearsay statements that were presented. First, the victims' statements to their grandmother were not excited utterances, under *Evid. R. 803(2)*. The grandmother's testimony clearly established that the two victims (ages 5 and 6) deliberated before they disclosed the alleged sexual assault to her. Also, their statements did not occur until more than two months after the alleged incident. Second, defense counsel was ineffective due to his failure to object to the testimony of the mother and the doctor from the child advocacy center, which was prejudicial to defendant. The mother's testimony was double hearsay, under *Evid. R. 805*, as she testified regarding what the grandmother had told her that the victims had said. Finally, the doctor's testimony did not qualify as a medical diagnosis exception to hearsay, under *Evid. R. 803(4)* as she was a "manufactured witness" for the State. The victims had already received medical attention from a private doctor for the alleged abuse.

OUTCOME: The judgment of the trial court was reversed and the cause was remanded.

CORE TERMS: girl, hearsay, inadmissible, hearsay statements, medical diagnosis, admissible, declarant, diagnosis, adult, voir dire, doctor's, medical professional, ineffective, utterance, sexual abuse, citation omitted, perpetrator, interview, excited, sexual, limine, reflective, stress, trial counsel's failure, plain error, admissibility, harmless, relayed, abuser, rape

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence
Evidence > Procedural Considerations > General Overview

[HN1] The admission of evidence lies within the broad discretion of a trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.

Evidence > Hearsay > Exceptions > General Overview
Evidence > Hearsay > Rule Components > General Overview
Evidence > Hearsay > Rule Components > Declarants
[HN2] *Evid. R. 801(C)*, defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is inadmissible at trial, unless it falls under an exception to the rules of evidence. *Evid. R. 802*. Under *Evid. R. 801(A)*, a statement is defined as an oral or written assertion or other nonverbal conduct of a person, if it is intended by him as an assertion. The declarant is the individual who makes the statement.

Evidence > Hearsay > Exceptions > Spontaneous Statements > General Overview
[HN3] If applicable, the excited utterance exception to hearsay, contained in *Evid. R. 803(2)*, is valid regardless of whether a declarant is available as a witness.

Evidence > Hearsay > Exceptions > Spontaneous Statements > Elements
[HN4] An excited utterance is a statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition. The rationale for the admission of these statements is that the shock of the event causes the declarant's reflective process to be halted. Thus, the statement is unlikely to have been fabricated and carries a high degree of trustworthiness. *Evid. R. 803(2)*.

Evidence > Hearsay > Exceptions > Spontaneous Statements > Criminal Trials
[HN5] Regarding declarations that are made by children of tender years, the Supreme Court of Ohio has held that each case must be decided on its own circumstances, since it is patently futile to attempt to formulate an inelastic rule delimiting the time limits within which an oral utterance must be made in order that it be termed a spontaneous exclamation.

Evidence > Hearsay > Exceptions > Spontaneous Statements > General Overview
[HN6] There is no per se amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought. The time gap for a young child may be longer than that of an adult, because a child may be under stress caused by the events for a longer period of time than adults.

Evidence > Hearsay > Exceptions > Spontaneous Statements > Elements
[HN7] Merely being "upset," without more, does not meet the standard of admissibility for an excited utterance, under *Evid. R. 803(2)*.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN8] The Supreme Court of Ohio has adopted the following test to determine if counsel's performance is ineffective. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance.

Evidence > Hearsay > Exceptions > General Overview
Evidence > Hearsay > Hearsay Within Hearsay
[HN9] *Evid. R. 805*, regarding double hearsay, provides that each part of a statement must conform to an exception to the hearsay rules in order for the entire statement to be admissible.

Criminal Law & Procedure > Pretrial Motions > Motions in Limine
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Evidence
Evidence > Procedural Considerations > Objections & Offers of Proof > Objections
[HN10] The granting of a motion in limine, alone, will not preserve error for review. Instead, a proper objection must also be made at trial at the time the allegedly inadmissible evidence is introduced.

Evidence > Hearsay > Exceptions > Medical Diagnosis & Treatment
[HN11] *Evid. R. 803(4)* creates an exception from the hearsay rule for statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. Statements in furtherance of diagnosis or treatment are presumed reliable since the effectiveness of the treatment depends on the accuracy of the information related. Statements made by a child during a medical examination identifying the perpetrator of sexual abuse, if made for purpose of diagnosis and treatment, are admissible pursuant to *Evid. R. 803(4)*, when such statements are made for the purposes enumerated in that rule.

Evidence > Hearsay > Exceptions > Medical Diagnosis & Treatment
[HN12] With respect to the medical diagnosis exception to hearsay, statements made by a child to a medical professional are not automatically excluded simply because the child did not possess the initial motivation to seek diagnosis or treatment, but rather were directed there by an adult. Once at the medical professional's office, however, it must be established that the child's statements were made for the purpose of medical diagnosis or treatment. Unlike adults, young children may not appreciate the medical significance of an interview with a doctor. Thus, in the case of a child of tender years, the Supreme Court of Ohio has recommended that trial courts consider, through a voir dire examination of the child, the circumstances surrounding the child's making of the statements to medical personnel before admitting the statements under *Evid. R. 803(4)*. Such circumstances include the type of environment the child was placed in, the attire of the interviewer, the presence of other medical professionals, or any other circumstance which would heighten the child's awareness that the questions asked were for the purpose of medical diagnosis or treatment.

Evidence > Hearsay > Exceptions > Medical Diagnosis & Treatment
[HN13] If, after reviewing the applicable circumstances, a trial court concludes that a child's statements to a medical professional were made for the purposes of medical diagnosis, the court

should admit the statements as an exception to hearsay. If, however, the trial court does not find sufficient factors indicating that the child's statements were made for the purpose of medical diagnosis or treatment, the statements must be excluded as not falling within the ambit of *Evid. R. 803(4)*.

Evidence > Hearsay > Exceptions > Medical Diagnosis & Treatment
[HN14] A doctor is not permitted, during a medical examination, to assume the role of a police investigator, elicit statements from the alleged victims, and, then, testify regarding those statements under the guise that they were given for the purpose of medical diagnosis or treatment.

Evidence > Hearsay > Exceptions > Medical Diagnosis & Treatment
[HN15] Although a voir dire of a child is desirable to determine the circumstances surrounding the child's statements to medical personnel prior to allowing the testimony under the medical diagnosis exception to hearsay, Dever does not actually mandate a voir dire. However, it is imperative to voir dire the children in a case of sexual abuse where the doctor at issue is not the children's regular pediatrician but, rather, is a State-selected, child-abuse investigator.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Evidence
Evidence > Hearsay > General Overview
[HN16] Generally, the improper admission of a single hearsay statement may be considered "harmless" error. This may be especially true if the victim directly testifies to the alleged events.

COUNSEL: Thomas L. Sartini, Ashtabula County Prosecutor and Angela M. Scott, Assistant Prosecutor, Jefferson, OH (For Plaintiff-Appellee).

Joseph P. Szeman, Painesville, OH (For Defendant-Appellant).

JUDGES: WILLIAM M. O'NEILL, J. DONALD R. FORD, P.J., concurs, DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

OPINION BY: WILLIAM M. **O'NEILL**

OPINION

[*57] WILLIAM M. O'NEILL, J.

[***17] [**P1] Appellant, Jerry Butcher, appeals from the judgment entered by the Ashtabula County Court of Common Pleas. The trial court sentenced Butcher to a total prison sentence of three life terms for his convictions for three counts of rape and two counts of kidnapping.

[**P2] On November 13, 2003, "T" and "D," aged six and five, respectively, were at the home of their grandmother, Mary Beth Askew ("Mary Beth"), for an overnight visit. That evening, the girls, who are the children of Mary Beth's daughter, Bethany Askew ("Bethany"), were accompanied by their younger brother. According to Mary Beth, the children frequently visited her home.

[**P3] Mary Beth was emptying the dishwasher while the girls were taking a bath together in the bathroom just adjacent to the kitchen area. Following their bath, the girls appeared in the bathroom doorway, acting very agitated and nervous. At trial, Mary Beth testified that the girls "were moving, like, from one foot to the other *** and looking at each other and one would say [to the other] 'you tell her. No, you tell her. Oh, let's tell her together. Okay, we're going to tell her on the count of three.'"

[**P4] The girls then dropped to the floor "like little rag dolls," crying and moaning, and told Mary Beth that "Jerry was sexing with them." Mary Beth [*58] stated that she walked up to where the girls were lying on the floor and put her arms around them, attempting to console them. At first, Mary Beth did not know who "Jerry" was, so she asked, and the girls told her "Jerry, who lives with Auntie Porsha." When she questioned the girls further, Mary Beth learned that Jerry had "put his man thing in them" and that this happened "at Jerry's house." Mary Beth was able to identify "Jerry" as Butcher.

[**P5] Naporsha (a.k.a. Porsha) Turner is the sister of T's father. Butcher lived with Turner in an apartment in Ashtabula, Ohio and is the father of Turner's two children, Corey and Kaylee. Butcher also has a son, Jared, from a previous relationship.

[**P6] After Mary Beth managed to get the girls calm, she called her daughter Bethany and relayed what the girls had told her. Bethany subsequently called the police. The next day, Mary Beth and Bethany met with police and made a report.

[**P7] Butcher was charged with three counts of rape, in violation of *R.C. 2907.02*, first-degree felonies, and two counts of kidnapping, in violation of *R.C. 2905.01*, first-degree felonies. One count each of kidnapping and rape alleged acts against T, while the remaining two rape charges and the final kidnapping charge alleged acts against D. Butcher pled not guilty to the charges, and a jury trial was held. The following testimony occurred at the jury trial.

[**P8] Bethany stated that T had spent the night at Butcher and Turner's house "numerous times," but that D, who is not related to Turner, had only spent the night there twice. Bethany testified that the last time either child spent the night was after Kaylee's first birthday party, which took place on September 6, 2003, at Nappi's Roller Den in Ashtabula, Ohio.

[**P9] T and D both testified at trial. D recalled attending a skating party on the day of the incident, but could not remember where the party had taken place. D did recall spending that night at Turner and Butcher's home. D testified that while at Turner's house, she was sitting on the couch watching cartoons when Butcher summoned T and D upstairs to his bedroom. [***18] At the time, Turner was downstairs with the baby.

[**P10] Once in the room, the door was closed and Butcher ordered the girls to get naked. Although D did not remember who closed the door, T testified that Butcher shut and locked the door. D testified that Butcher had them lay face down on the bed and Butcher got on top of them. She reported that he put his "thingy" into "our private," which she said meant her "butt" and her "mouth." D did not specifically state what Butcher's "thingy" meant, but when asked, pointed to the area between her legs to indicate where Butcher's "thingy" was located. [*59] She said that when Butcher put his "thingy" in her "butt" she felt sad, but it did not hurt. D testified that Butcher then put his "thingy" in her mouth.

[**P11] Afterwards, D stated that Butcher made T lie down and put his "thingy" in her "butt." D then testified that "after we were done, we had to go downstairs." When asked to identify "Jerry," D was unable to point out Butcher in the courtroom.

[**P12] T also testified at trial, remembering that there was a skating party that day, but she could not remember the exact date of the party. After the skating party, T remembered going to Turner's apartment in the late afternoon or evening. T knew that "Jerry" was Turner's boyfriend. T testified that she and D went to the room upstairs because "Aunt Porsha called us in and then she told us that Jerry wanted us upstairs and then we went upstairs to see what he wanted." T continued to testify as follows:

[**P13] "He told us to get naked and then he got naked and then after that, we sat down on the bed and then Jerry - Jerry put on this flavored stuff. It was banana in this tube and it didn't really come out, so he had to take off the lid and get some and put it on his private. And then he told [D] to lay down on the bed and she did. Then after that I was *** sitting down on the bed looking around the room while Jerry - Jerry and [D] were on the bed. [D] was laying face down and Jerry was on top of her and his private was in her butt. *** Then, after that, he did the same thing to me and I was laying the same way as [D] and he put more of that banana flavored stuff on it and he stuck his private in my butt, and then after that, he got his clothes on and we got our clothes on and he unlocked the door and then he opened it and then he told us not to tell anybody because he would go to jail, and so we went downstairs and we sat. We sat on the couch with the kids and we watched cartoons."

[**P14] When asked what she had meant by Butcher's "private," T said it was "under his stomach and between his legs," on the front part of his body. T testified that she knew the "stuff" Butcher put on his "private" was banana-flavored because it "said it on the tube right under it." T stated that she was not looking the entire time that Jerry was doing things to D, but that she heard her crying. T testified that when Butcher did the things to her, she was crying too. When asked to identify the "Jerry who lives with Auntie Porsha," T was able to identify Butcher in the courtroom.

[**P15] Dr. Stephanie Dewar, a pediatrician from Tod Children's Hospital in Youngstown, Ohio, testified for the state. Dr. Dewar is also the Medical Director of the Child Advocacy Center, which examines children in cases of suspected child abuse. Dr. Dewar examined both girls on November 25, 2003.

[*60] [**P16] Dr. Dewar testified as to what had been reported to her by the children, Mary Beth, and Bethany and, also, regarding [***19] the results of each child's physical examination. Dr. Dewar testified that her examination of D revealed an anal fissure, normally not present, and a flattening out of the folds in the anal area. T's physical examination revealed similar results. Dr. Dewar noted that these results were considered "consistent with anal penetration," but "not diagnostic" of it. Dr. Dewar testified that her "impression after evaluation *** was that there were physical findings present and evaluation was consistent with sexual abuse."

[**P17] Butcher testified in his own defense that on the date in question, he took his son Jared to a Little League double-header in Andover, Ohio. This testimony was corroborated by defense witness Tim Lesperance, who testified that Butcher and Jared were at the games until some time between 2:30 and 3:30 p. m. Following the games, Butcher testified that he and Jared went to Ashtabula Mall to have something to eat and returned home prior to Turner returning home with Corey and Kaylee. Butcher then testified that Turner took Corey and Kaylee to WalMart to

spend some of Kaylee's birthday money on presents, leaving him alone in the house with Jared. Butcher testified that T and D did not spend the night at his house and denied that he had anything to do with the alleged acts.

[**P18] The jury returned guilty verdicts on all five counts of the indictment. Upon sentencing, the trial court determined that the kidnapping counts were allied offenses of similar import and merged them with the rape counts. Butcher was sentenced to three mandatory life terms on the rape counts, to be served concurrently.

[**P19] Butcher has timely appealed the trial court's judgment to this court. He raises two assignments of error for our review. His first assignment of error is:

[**P20] "The trial court erred to the prejudice of the appellant in admitting hearsay statements which did not fall within any exception to the prohibition of *Evid.R. 802* against their admissibility. "

[**P21] Butcher challenges the admissibility of certain testimony from Mary Beth, claiming it contained hearsay statements that are not subject to any exception and, therefore, should have been excluded. Butcher maintains that the failure to exclude these statements was prejudicial error warranting reversal of his convictions.

[**P22] [HN1] "The admission of evidence lies within the broad discretion of a trial court, and a reviewing court should not disturb evidentiary decisions in the [*61] absence of an abuse of discretion that has created material prejudice." [1] "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." [2]

1 *State v. Noling, 98 Ohio St.3d 44, 2002 Ohio 7044, P43, 781 N.E.2d 88*, citing *State v. Issa (2001), 93 Ohio St.3d 49, 64, 2001 Ohio 1290, 752 N.E.2d 904*.

2 *State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144*.

[**P23] Part of Mary Beth's testimony during direct examination related to statements the girls made when they initially reported the abuse to her. The record reveals that the trial court admitted, over the objections of Butcher's defense counsel, such statements as "Jerry was sexing with [us]," "he put his man thing in us," that the incident occurred "at Jerry's house," and that "Jerry would be mad at [us] because he'll have to go to jail."

[**P24] [HN2] *Evid. R. 801(C)*, defines hearsay as "a statement, other than one made by [***20] the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible at trial, unless it falls under an exception to the rules of evidence. [3]

3 *Evid.R. 802*.

[**P25] Under *Evid.R. 801(A)*, a statement is defined as an oral or written assertion or other nonverbal conduct of a person, "if it is intended by him as an assertion." The declarant is the individual who makes the statement. [4] In the instant matter, the testimony of Mary Beth is unquestionably hearsay as it related to out-of-court statements made *by the girls*, who are the declarants, which were offered to prove the truth of the matter asserted.

4 *Evid.R. 801(B)*.

[**P26] The state counters that even if the statements are hearsay, they are otherwise admissible under the "excited-utterance" exception to the hearsay rule, contained in *Evid.R. 803(2)*. [HN3] If applicable, the exception is valid regardless of whether the declarant is available as a witness. [5]

5 *Evid.R. 803*. See, also, *State v. Bowles (Apr. 28, 1998), 10th Dist. No. 97APA09-1213, 1998 Ohio App.LEXIS 1889, at *11*.

[**P27] [HN4] An excited utterance is "[a] statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition." [6] The rationale for the admission of these statements is that the shock of the event causes the declarant's reflective process to be halted. [*62] Thus, the statement is unlikely to have been fabricated and carries a high degree of trustworthiness. [7]

6 *Evid.R. 803(2)*.

7 *State v. Taylor (1993), 66 Ohio St.3d 295, 300, 612 N.E.2d 316*, quoting Staff Note to *Evid.R. 803(2)*, citing McCormick, § 297 (2d ed. 1972).

[**P28] The state correctly notes that there has been a trend in recent years to liberalize the application of the excited-utterance exception to cases that involve the sexual abuse of children. [HN5] Regarding declarations that are made by children of tender years, the Supreme Court of Ohio has held "each case must be decided on its own circumstances, since it is patently futile to attempt to formulate an inelastic rule delimiting the time limits within which an oral utterance must be made in order that it be termed a spontaneous exclamation." [8]

8 *State v. Duncan (1978), 53 Ohio St.2d 215, 219-220, 373 N.E.2d 1234*.

[**P29] In the case sub judice, while it is apparent the children were still showing the effects of the stress of the event, we cannot conclude that the statements made by the girls were not the result of reflective thought. Mary Beth's testimony clearly establishes that T and D deliberated before they disclosed the alleged sexual assault to her, as evidenced by the children debating

back and forth about which one would tell her before finally agreeing to disclose the information "on the count of three."

[**P30] In addition, we note the girls' statements to Mary Beth did not occur until more than two months after the alleged incident. The Supreme Court of Ohio has held:

[**P31] [HN6] "There is no *per se* amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of [***21] the event and the statement may *not* be a result of reflective thought." [9]

9 (Emphasis in original.) *State v. Taylor, 66 Ohio St.3d at 303*.

[**P32] This court has held that the time gap for a young child may be longer than that of an adult, because a child '"may be under stress caused by the events for a longer period of time than adults.'" [10]

10 (Citation omitted.) *State v. Reed (May 31, 1991) 11th Dist. No. 89-L-14-130, 1991 Ohio App. LEXIS 2496, at *15-16*.

[**P33] While there are some cases supporting the proposition that statements made following a lapse of time of greater than two months from alleged sexual abuse maybe admissible as excited utterances, each is distinguishable from the case sub judice. One case was decided based upon the "limited reflective abilities" of the declarant or the character of the statement being "sufficiently [*63] spontaneous to qualify as admissible hearsay." [11] Other cases were decided upon a combination of the relative youth of the child and the stress from the "startling event" being not the sexual assault itself, but a subsequent event that caused the "stress of excitement" of the earlier sexual assault to reoccur. [12]

11 *State v. Negolfka (Nov. 19, 1987), 8th Dist. No. 52905, 1987 Ohio App. LEXIS 9645, at *8*.

12 See *State v. Dubose (Nov. 22, 1989), 8th Dist. No. 56174, 1989 Ohio App. LEXIS 5201, at *5-7*; and *State v. Kincaid (Oct. 18, 1995), 9th Dist. Nos. 94CA005942 and 94CA005945, 1995 Ohio App. LEXIS 4638, at *11-14*.

[**P34] In the instant case, no such circumstances exist. It is undisputed that the girls did not disclose any information about the incident to anyone for over two months. The evidence shows that the girls did not become upset until *after* they made the announcement to Mary Beth. Additionally, [HN7] merely being "upset," without more, does not meet the standard of admissibility under *Evid.R. 803(2)*. [13] The declarations lacked the spontaneous quality necessary for an excited utterance.

13 *State v. Taylor, 66 Ohio St.3d at 303*

[**P35] We note several of the girls' statements to Mary Beth occurred in response to Mary Beth's follow-up questioning to their initial statement. Regarding the admissibility of an "excited utterance" statement resulting from questioning, the Supreme Court of Ohio has held:

[**P36] "'The admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties.'" [14]

14 *State v. Simko (1994), 71 Ohio St.3d 483, 490, 1994 Ohio 350, 644 N.E.2d 345*, quoting *State v. Wallace (1988), 37 Ohio St.3d 87, 524 N.E.2d 466*, paragraph two of the syllabus.

[**P37] We have concluded that the girls' initial statements were a product of reflective thought and do not qualify as excited utterances. Therefore, any subsequent statements made to Mary Beth as a result of her follow-up questioning were likewise derivative of the reflective thought process and were not made as a result of the stress of the alleged abuse.

[**P38] Accordingly, we conclude the trial court's admission of Mary Beth's testimony regarding the hearsay statements of the girls was error.

[**P39] Butcher's first assignment of error has merit.

[**P40] Butcher's second assignment of error is:

[*64] [**P41] [***22] "The appellant was denied the effective assistance of counsel, contrary to his rights guaranteed by the *Sixth* and *Fourteenth Amendments of the United States Constitution* and *Section 10, Article I, of the Ohio Constitution.*"

[**P42] Butcher argues that the testimony of Dr. Dewar and Bethany contained inadmissible hearsay statements. He claims his trial counsel's failure to object to these alleged errors constitutes ineffective assistance of counsel, requiring the reversal of his convictions.

[**P43] In *State v. Bradley*, [HN8] the Supreme Court of Ohio adopted the following test to determine if counsel's performance is ineffective: "[c]ounsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." [15]

15 *State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373*, paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*.

[**P44] Our first inquiry is whether trial counsel's performance fell below an objective standard of reasonable representation for failing to object to the statements. Thus, we will determine whether the testimony of these witnesses contained inadmissible hearsay statements.

[**P45] Butcher complains about two statements made by Bethany in response to direct examination. In response to the prosecution's line of questioning about the number of times D had visited Butcher's home, Bethany responded that D had only visited the home twice, the last time being the day of Kaylee's birthday party. When asked why that date stood out in her mind, Bethany's testimony was "that was the last time my girls were around them and they told my mom that [Butcher] had touched [them]." In response to the questioning of the prosecutor related to the reason Bethany sent the girls to see a counselor, she responded "because they said that they had intercourse with Jerry Butcher."

[**P46] Regarding the first statement, Bethany testified as to what the girls told her mother, who then relayed this information to Bethany. Regarding the second statement, Bethany testified that the "girls said" the statement, but does not indicate to whom the girls made the statement. We will presume this statement was also made to Mary Beth, who relayed it to Bethany. This is because Bethany did not testify that the girls ever directly told her about the alleged events. Moreover, both Mary Beth and Bethany testified that the girls initially told Mary Beth, who relayed the information to Bethany.

[*65] [**P47] Accordingly, to properly review Bethany's in-court testimony, we must engage in a double-hearsay analysis pursuant to [HN9] *Evid.R. 805*, which provides that each part of a statement must conform to an exception to the hearsay rules in order for the entire statement to be admissible. [16] Here, there are two levels of potential hearsay. First, the girls made statements to Mary Beth, then Mary Beth relayed those statements to Bethany, and, finally, Bethany testified regarding those statements in court.

16 See, e.g., *State v. Vinson (1990), 70 Ohio App.3d 391, 399, 591 N.E.2d 337*.

[**P48] An example of double hearsay occurred in the case of *State v. Turvey.* [17] [***23] In *State v. Turvey*, the Fourth Appellate District held that the double-hearsay statement, where the witness testified as to what a child told to the child's mother, was inadmissible. [18]

17 *State v. Turvey (1992), 84 Ohio App.3d 724, 618 N.E.2d 214*.

18 *Id. at 745-746*.

[**P49] In *State v. Awkal*, the Supreme Court of Ohio addressed the issue of double hearsay. In that case, the victim's attorney testified as to what the victim told the attorney regarding a threat from the defendant. [19] The statement from the victim to the attorney was arguably admissible pursuant to *Evid.R. 803(3)*, because it concerned the victim's then-existing mental state. [20] However, the initial statement threatening the victim from the defendant was not admissible. [21] Therefore, the Supreme Court of Ohio held that the attorney's entire testimony on this issue was inadmissible. [22]

19 *State v. Awkal (1996), 76 Ohio St.3d 324, 330, 1996 Ohio 395, 667 N.E.2d 960*.

20 *Id. at 331*.

21 Id.

22 Id.

[**P50] In the case sub judice, working backwards, the level of the statements from Mary Beth to Bethany are arguably not hearsay. This is because the statements were not offered to prove the truth of the matters asserted, i.e. that Butcher had sexual conduct with the girls, but, rather, were offered to show Bethany's state of mind as to why the date stood out in her mind and why she took to the girls to counseling. However, the next level of the statements that needs to be examined are the girls' statements to Mary Beth that Butcher had sexual conduct with the girls. As noted in our prior analysis, these statements were hearsay, as they were made out of court and sought to prove the truth of the matter asserted. These statements are not admissible under any of the hearsay exceptions. Since the [*66] initial level of the statements were inadmissible, Bethany's entire testimony on this issue was inadmissible. [23] The bottom line is that Mary Beth's statements as to what the girls told her are inadmissible. Those same statements do not become admissible when they are relayed to the court through a third party.

23 *Evid.R. 805*.

[**P51] Butcher's trial counsel's performance fell below an objective level of reasonable representation due to counsel's failure to object to Bethany's testimony. Trial counsel properly objected when Mary Beth testified as to what the girls told her. It was necessary for counsel to object when Bethany testified as to what the girls told Mary Beth. These inadmissible hearsay statements directly pertained to the ultimate issue of Butcher's guilt. Trial counsel should have objected to them.

[**P52] Butcher also challenges statements made by Dr. Dewar, including "the children's recitation of the events as well as the identity of their abuser being Mr. Butcher." In addition, we note the state introduced copies of the medical reports of Dr. Dewar's examinations of the girls and these reports were admitted as exhibits. These reports contain similar hearsay statements regarding the identity of the perpetrator and a description of the events. The state argues that these statements were made for the purposes of diagnosis and treatment and, therefore, admissible under *Evid.R. 804*.

[**P53] The day trial began, defense counsel filed a motion in limine seeking to exclude "all statements made to any *** social worker, nurse or doctor of the Tri-County Advocacy Center," arguing that [***24] the totality of the circumstances supported a conclusion that the children were taken to the center, not for the purposes of diagnosis and treatment, but for the purposes of investigation and prosecution. The trial court conditionally granted Butcher's motion in limine "depend[ent] upon the evidence establishing a recognized exception to the hearsay rule."

[**P54] [HN10] The granting of a motion in limine, alone, will not preserve error for review. [24] Instead, a proper objection must also be made at trial at the time the allegedly inadmissible evidence is introduced. [25]

24 *State v. Stewart (Dec. 8. 1997), 4th Dist. No. 96CA18, 1997 Ohio App. LEXIS 5625, at *12*, citing *State v. Hill (1996), 75 Ohio St.3d 195, 202-203, 1996 Ohio 222, 661 N.E.2d 1068*.

25 *State v. Stewart, 1997 Ohio App. LEXIS 5625, at *12*, citing *State v. Brown (1988), 38 Ohio St.3d 305, 528 N.E.2d 523*, paragraph three of the syllabus and *State v. Grubb (1986), 28 Ohio St.3d 199, 28 Ohio B. 285, 503 N.E.2d 142*, paragraph two of the syllabus.

[**P55] We will now turn to whether Dr. Dewar's testimony contained hearsay statements, which should have been objected to.

[*67] [**P56] [HN11] *Evid.R. 803(4)* creates an exception from the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

[**P57] Statements in furtherance of diagnosis or treatment are presumed reliable since the effectiveness of the treatment depends on the accuracy of the information related. [26] "Statements made by a child during a medical examination identifying the perpetrator of sexual abuse, if made for purpose of diagnosis and treatment, are admissible pursuant to *Evid.R. 803(4)*, when such statements are made for the purposes enumerated in that rule." [27] This court has interpreted *State v. Dever*, as follows:

26 (Citation omitted.) *State v. Boston (1989), 46 Ohio St.3d 108, 121, 545 N.E.2d 1220*.

27 *State v. Dever (1992), 64 Ohio St.3d 401, 1992 Ohio 41, 596 N.E.2d 436*, paragraph two of the syllabus.

[**P58] "[P]ursuant to *Dever*, [HN12] statements made by a child to a medical professional are not automatically excluded simply because the child did not possess the initial motivation to seek diagnosis or treatment, but rather were directed there by an adult. Once at the medical professional's office, however, it must be established that the child's statements were made for the purpose of medical diagnosis or treatment." [28]

28 *In re Cory M. (1999), 134 Ohio App.3d 274, 282, 730 N.E.2d 1047*.

[**P59] Unlike adults, young children may not appreciate the medical significance of an interview with a doctor. Thus, in the case of a child of tender years, the Supreme Court of Ohio recommended that trial courts consider, through a voir dire examination of the child, the circumstances surrounding the child's making of the statements to medical personnel before admitting the statements under *Evid.R. 803(4)*. [29] Such circumstances include "the type of environment the child was placed in, the attire of the [interviewer], the presence of other medical

professionals, or any other circumstance which would heighten the child's awareness that the questions asked were for the purpose of medical [***25] diagnosis or treatment." [30]

29 *State v. Dever, 64 Ohio St.3d at 410*.

30 *State v. Griffith, 11th Dist. No. 2001-T-0136, 2003 Ohio 6980, at P59*.

[**P60] [HN13] If, after reviewing the applicable circumstances, the trial court concludes that the child's statements to the medical professional were made for [*68] the purposes of medical diagnosis, the court should admit the statements. [31] "If, however, the trial court does not find sufficient factors indicating that the child's statements were made for the purpose of medical diagnosis or treatment, the statements must be excluded as not falling within the ambit of *Evid.R. 803(4)*." [32]

31 *State v. Jett (Mar. 31, 1998), 11th Dist. No. 97-P-0023, 1998 Ohio App. LEXIS 1451, at *35*.

32 Id., citing *State v. Dever, 64 Ohio St.3d 401, 1992 Ohio 41, 596 N.E.2d 436*.

[**P61] Butcher argues that the aforementioned statements were improperly admitted under *Evid.R. 803(4)*, since the trial court failed to voir dire T and D to establish a foundation for the admission of the testimony. Prior to the second day of trial, the court conducted an in-chambers discussion related to the pending testimony of Dr. Dewar. The court elected to allow Dr. Dewar to testify, despite the fact that no voir dire had been conducted on the children.

[**P62] Since no voir dire was conducted, we will examine the surrounding circumstances, as gleaned from the other evidence in the record, to determine whether the record contains sufficient evidence that the girls' statements to Dr. Dewar were made for the purposes of medical diagnosis or treatment.

[**P63] Dr. Dewar testified that the identity of an alleged abuser is an important consideration to determine the "risk of transmission of sexually transmitted diseases" and because of "safety issues of the child." Thus, she concluded that a child's identification of the alleged abuser is made for the purposes of medical diagnosis and treatment. However, her testimony is not supported by the facts of this case. The medical reports have a section regarding sexually transmitted diseases. These reports indicate that neither girl was tested for sexually transmitted diseases. If Dr. Dewar was so concerned about sexually transmitted diseases that she needed to ascertain the identity of the alleged perpetrator for this reason, the question that arises is - why were the girls not tested for sexually transmitted diseases?

[**P64] It is important to review the facts as to how the children arrived at the Child Advocacy Center. Mary Beth testified that she took the girls to the Ashtabula Clinic in relation to the alleged abuse by Butcher. The girls were examined by a doctor at this facility. Mary Beth testified that she and Bethany were directed to take the girls to see Dr. Dewar by Ashtabula County Children Services Board ("children services"). Further, Detective Joseph Cellitti of the Ashtabula City Police Department testified for the state. He testified he did not interview the

children in this matter. Instead, he referred them to the Child Advocacy Center for the purposes of an interview and examination.

[**P65] Further, the evidence in this matter indicates the social worker from children services actually went to the Child Advocacy Center. The medical [*69] reports indicate the social worker was present at the hospital when the girls were examined by Dr. Dewar.

[**P66] In this matter, Dr. Dewar amounted to a "manufactured witness" for the state. The girls had already received [***26] medical attention from a private doctor for the alleged abuse. They were taken to see Dr. Dewar upon the recommendation of state agents, namely children services and the police. It is readily apparent that Dr. Dewar's primary function was to collect evidence to support a conviction. At trial, even the trial court stated, "I'm telling you [Dr. Dewar] is an advocate *** her job is to try and get convictions."

[**P67] Officer Cellitti specifically testified that he did not interview the children and referred them to the Child Advocacy Center to be interviewed. Thereafter, he testified that he reviewed the reports from the Child Advocacy Center and, based in part upon those reports, determined that Butcher was a suspect in this matter.

[**P68] We note Dr. Dewar testified that she conducted the interviews with the girls herself. However, [HN14] a doctor is not permitted, during a medical examination, to assume the role of a police investigator, elicit statements from the alleged victims, and, then, testify regarding those statements under the guise that they were given for the purpose of medical diagnosis or treatment.

[**P69] This court has previously held that, [HN15] although a voir dire of the child is desirable, *Dever* "does not actually mandate a voir dire." [33] However, it is imperative to voir dire the children in a case like this where the doctor at issue is not the children's regular pediatrician but, rather, is a state-selected, child-abuse investigator. Children services, the police, the mother, the grandmother, and the doctor all knew this examination was for the purpose of collecting evidence. How then, can the children be presumed to know that it was for some other purpose?

33 *State v. Cornwell (Feb. 27, 1998), 95-T-5379, 1998 Ohio App. LEXIS 806, at *32*.

[**P70] Without the benefit of a voir dire examination, the remaining portions of the record do not contain sufficient indicia that the girls' statements to Dr. Dewar were made for the purposes of medical diagnosis or treatment. Thus, Dr. Dewar's testimony contained inadmissible hearsay statements.

[**P71] While we have concluded that the statements made to Dr. Dewar were inadmissible because she was, in effect, a "manufactured witness," we recognize that specialized medical professionals such as Dr. Dewar will continue to play an important role in abuse cases. Dr. Dewar's testimony regarding her physical examinations of the girls was relevant and admissible. Our opinion criticizing the use of a "manufactured witness" to introduce a child's quasi-police [*70] statement into evidence should not be construed to prohibit the use of a state-selected doctor to obtain forensic or medical evidence to support the state's case. Further, our opinion does not challenge the admission of a child's statement made to a medical provider *if it is*

demonstrated that the statement was made for the purpose of medical treatment or diagnosis as permitted by *Evid.R. 803(4)*.

[**P72] Trial counsel's performance fell below an objective level of reasonable representation due to counsel's failure to object to the inadmissible hearsay statements in Dr. Dewar's testimony. Since counsel filed a motion in limine on this exact issue, it was inexcusable for counsel to fail to object when Dr. Dewar testified regarding the girls' statements.

[**P73] We have found that the performance of Butcher's trial counsel was deficient for failing to object to the hearsay statements in the testimony of Bethany and Dr. Dewar. The next inquiry is [***27] whether Butcher was prejudiced by these statements.

[**P74] In this matter, Dr. Dewar testified regarding the girls' statements identifying the alleged abuser as Butcher and the narrative background she was given about the incident. This testimony functioned as Dr. Dewar bolstering the girls' testimony and vouching for their credibility.

[**P75] As to the testimony from Bethany, we note it was substantially similar to that of Mary Beth. However, Mary Beth's testimony regarding the girls' statements was inadmissible hearsay. Thus, the inadmissible hearsay was presented to the jury a second time through Bethany's testimony.

[**P76] We conclude that Butcher was prejudiced by his trial counsel's failure to object to the inadmissible hearsay statements contained in the testimony of Bethany and Dr. Dewar.

[**P77] Butcher's second assignment of error has merit.

[**P78] [HN16] Generally, the improper admission of a single hearsay statement may be considered "harmless" error. This may be especially true if the victim directly testifies to the alleged events. However, the amount of inadmissible hearsay used in this case is significant. Four different adults (Mary Beth, Bethany, Dr. Dewar, and Detective Cellitti) testified that Butcher was the culprit of the offenses. The medical reports also listed Butcher as the alleged perpetrator. In addition, three of the adults (Mary Beth, Bethany, and Dr. Dewar) specifically testified that Butcher had sexual conduct with the girls. Obviously, none of the adults were present at the time the alleged abuse occurred. Therefore, all of these adults formulated their opinions regarding Butcher based on what the girls told them or other individuals. By definition, these were [*71] hearsay statements. As we have concluded, these hearsay statements do not fall within any hearsay exception.

[**P79] We note the girls testified as to the alleged events. The prejudice arises when numerous adults repeat the girls' stories in court. If a statement is repeated often enough, it is more susceptible to belief. Additionally, the repetition has the effect of the adults vouching for the veracity of the statements. For example, members of the jury may think, if Dr. Dewar believed the girls' statements, maybe we should too.

[**P80] Moreover, certain portions of the girls' testimony was suspect. Specifically, D could not identify Butcher in court. T testified that her aunt, Turner, facilitated the crimes by instructing the girls to go to the room to be alone with Butcher. T testified that D was crying during the incident, but D testified that she did not cry.

[**P81] There was evidence regarding the girls' physical injuries. Dr. Dewar testified that the girls' injuries were "consistent with" but not "diagnostic of" sexual abuse. Also, she testified that other things could cause these types of injuries. Accordingly, the medical evidence is equivocal

regarding the occurrence of the abuse. More importantly, the medical evidence did not, in any way, link Butcher to the alleged crimes.

[**P82] As a result of the numerous hearsay statements presented in this matter, we cannot conclude Butcher had a fair trial.

[**P83] The judgment of the trial court is reversed. This matter is remanded to the trial court for a new trial.

DONALD R. [***28] FORD, P.J., concurs,

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

DISSENT BY: DIANE V. GRENDELL

DISSENT

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

[**P84] As an initial matter, I agree with the majority that the admission of Mary Beth Askew's identification testimony of appellant as the perpetrator was hearsay not subject to a recognized exception and therefore, should not have been admitted. However, I do not agree, in the context of the remaining evidence and testimony, that the admission of this statement constituted prejudicial error requiring reversal of appellant's convictions. Accordingly, I respectfully dissent.

[**P85] A decision to admit or exclude testimony is a matter within the sound discretion of the trial court and will not be overturned absent a clear abuse of discretion whereby the defendant has suffered *material prejudice*. [*72] *Hores v. Weaver, 11th Dist. Nos. 2004-T-0045, 2004-T-0047, 2004-T-0048, 2005 Ohio 6076, at P17* (emphasis added), citing *Quinn v. Paras, 8th Dist. No. 82529, 2003 Ohio 4952, at P31*; *State v. Brazzon, 11th Dist. No. 2001-T-0050, 2003 Ohio 6088, at P13*; *State v. Long (1978), 53 Ohio St.2d 91, 98, 372 N.E.2d 804*; *State v. Sage (1987), 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343*, at paragraph two of the syllabus. (Emphasis added). In applying an abuse of discretion standard, the appellate court is not free to substitute its judgment for that of the trial court. *In re Jane Doe 1 (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181* (citation omitted).

[**P86] The testimony of Mary Beth Askew was hearsay, not subject to an exception, and admission of that testimony was error. However, the inquiry does not end there. A reviewing court next must determine whether this error is harmless or prejudicial.

[**P87] Under *Evid R.103(A)*, and *Crim.R. 52(A)*, error is harmless unless substantial rights of the defendant are affected.*State v. Hicks (Aug. 16, 1991), 6th Dist. No. L-83-074, 1991 Ohio App. LEXIS 3856, at *13*. For nonconstitutional errors, the test is whether "there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside." *State v. Cowans (1967), 10 Ohio St.2d 96, 104, 227 N.E.2d 201*. Where constitutional error in the admission of evidence exists, "such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt." *State v. Williams (1983), 6 Ohio St.3d 281, 6 Ohio B. 345, 452 N.E.2d 1323*, at paragraph six of the syllabus.

[**P88] The admission of Mary Beth's hearsay statements of the victims was harmless error under either test. Both of the victims testified as to the events that occurred, and their testimony was in substantial accord with regard to all relevant facts. The victims were subject to cross-examination and the jury was free to consider the weight and credibility of their testimony. Moreover, the victims' testimony was corroborated by physical evidence "consistent with anal penetration." Dr. Dewar testified that in most cases of alleged sexual abuse, such physical evidence was the exception rather than the rule. Based upon this evidence, even if Mary Beth's testimony had not been admitted, the jury had substantial evidence to convict appellant.

[**P89] The same could be said for the statements from Bethany Askew and Dr. Dewar. Interestingly, appellant chooses not to directly challenge the admissibility of the statements of Dr. Dewar and Bethany Askew, instead challenging his conviction on the basis of a claim of ineffective assistance of counsel.

[**P90] [***29] The United States Supreme Court has adopted a two-part test for determining whether trial counsel was ineffective: "First, the defendant must show that counsel's performance was deficient," meaning that they "made errors [*73] so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. "Second, the defendant must show that the deficient performance *prejudiced the defense*." Id. (emphasis added).

[**P91] In Ohio, there exists a strong presumption that a licensed attorney is competent. *State v. Smith (1985), 17 Ohio St.3d 98, 100, 17 Ohio B. 219, 477 N.E.2d 1128*. Reversal of a conviction, therefore, places the burden on the defendant to show that counsel's deficient performance raises a reasonable probability that, *but for counsel's errors, the result of the trial would have been different*. *State v. Bradley (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373* (citation omitted).

[**P92] Defense counsel made no objection at trial to the testimony of either Bethany or Dr. Dewar identifying appellant as the perpetrator of the sexual abuse. [34] Accordingly, he has waived all but plain error. See *State v. Santiago, 10th Dist. No. 02AP-1094, 2003 Ohio 2877, at P11*, (holding that failure to object to the introduction of hearsay evidence at trial waives all claims of error except for plain error).

34 With respect to the identification testimony of Dr. Dewar, the trial court conditionally granted a motion in limine excluding these statements "depend[ent] upon the evidence establishing a recognized exception to the hearsay rule." At trial, however, defense counsel made no objection to the admission of this testimony. See, *McCabe/Marra Co. v. Dover (1995), 100 Ohio App.3d 139, 160, 652 N.E.2d 236* ("a ruling on a motion *in limine* is a tentative, interlocutory, precautionary ruling by a court in anticipation of its ruling on evidentiary issues at trial"); *State v. Stewart (Dec. 8. 1997), 4th Dist. No. 96CA18, 1997 Ohio App. LEXIS 5625, at *10 n.4* (the grant or denial of a motion in limine will not preserve error for review, absent a proper objection made at trial).

[**P93] Pursuant to *Crim. R. 52(B)*, a plain error or defect affecting substantial rights may be noticed, if not brought to the attention of the court. *Long, 53 Ohio St.2d at 94*. Plain error is to be invoked only in exceptional circumstances to avoid a miscarriage of justice. Id. (citation omitted).

[**P94] The test for "plain error" is enunciated under *Criminal Rule 52(B)*. In order for *Crim.R. 52(B)* to apply, a reviewing court must find that (1) there was an error, i.e., a deviation from a

legal rule; (2) that the error was plain, i.e., that there was an "obvious" defect in the trial proceedings; and (3) that the error affected "substantial rights," i.e., affected the outcome of the trial. *State v. Barnes, 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240* (citations omitted).

[**P95] With regard to the testimony of Bethany Askew, the majority indulges in a presumption in order to justify its conclusion that the statements were hearsay within hearsay and thus, inadmissible. This conclusion ignores the fact [*74] that it is an equally reasonable presumption that Bethany, as the children's mother, heard this information directly from the girls and also fails to take into account the context in which the two challenged statements were actually made.

[**P96] As the majority correctly states, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter* [***30] *asserted*." *Evid. R. 801(C)* (emphasis added).

[**P97] While on the surface, it may appear that the statements of Bethany Askew are substantially similar to those of her mother, Mary Beth. A review of the first statement reveals that its purpose was *not* to prove the truth of the matter asserted, i.e. that Butcher had intercourse with the girls, but rather was made to pinpoint the date of D's last visit to Butcher's home. Bethany's second statement presents a closer case. However, even if the second statement was impermissible hearsay, the statement was "merely cumulative and superfluous," with the testimony of her mother, and was therefore harmless. *Williams, 6 Ohio St.3d at 291*.

[**P98] With respect to Dr. Dewar's testimony, *Evid.R. 803(4)* creates an exception from the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *State v. Dever, 64 Ohio St.3d 401, 406-407, 1992 Ohio 41, 596 N.E.2d 436* (citation omitted). The rule "extends the common-law doctrine to admit statements made to a physician *** without regard to the purpose of the examination or the need for the patient's history," thus "*enabling the doctor to testify even when no treatment is contemplated*." *State v. Boston (1989), 46 Ohio St.3d 108, 121, 545 N.E.2d 1220* (citation omitted) (emphasis added).

[**P99] Statements in furtherance of diagnosis or treatment are presumed reliable since the effectiveness of the treatment depends on the accuracy of the information related. Id. Furthermore, "[S]tatements made by a child during a medical examination identifying the perpetrator of sexual abuse, if made for the purpose of diagnosis and treatment, are admissible pursuant to *Evid.R. 803(4)* , when such statements are made for the purposes enumerated in that rule." *Dever, 64 Ohio St.3d at 414*. "[P]ursuant to *Dever*, statements made by a child to a medical professional are not automatically excluded simply because the child did not possess the initial motivation to seek diagnosis or treatment, but rather were directed there by an adult. Once at the medical professional's office, however, it must be established that the child's statements were made for the purposes of medical diagnosis or treatment." *In re Cory, 134 Ohio App.3d 274, 282, 730 N.E.2d 1047*.

[*75] [**P100] In the case of a child of tender years, *Dever* recommended that trial courts consider the circumstances surrounding the child's making of the statements to medical personnel before admitting the statements under *Evid.R. 803(4). 64 Ohio St.3d at 410*. Such circumstances include "the type of environment the child was placed in, the attire of the [healthcare professional], the presence of other medical professionals, or any other circumstance

which would heighten the child's awareness that the questions asked were for the purpose of medical diagnosis *or* treatment." *State v. Griffith, 11th Dist. No. 2001-T-0136, 2003 Ohio 6980, at P59* (emphasis added).

[**P101] Unlike all of the cases to which appellant cites supporting his argument, Dr. Dewar testified that she conducted the interviews with the girls herself. Cf. *Cory, 134 Ohio App.3d at 283* ("while the white lab coats and medical instruments traditionally seen at a doctor's office *might* signal in a child's mind [***31] the seriousness of the situation and the necessity to tell the truth, such as existed in *Dever*, there is no indication that a typically dressed social worker *** would evoke a similar reaction in the eyes of a child") (emphasis sic).

[**P102] Moreover, prior to Dr. Dewar's testimony which related the girls' statements identifying appellant as their abuser, she testified that the identity of an alleged abuser is an important consideration to determine the "risk of transmission of sexually transmitted diseases" and because of "safety issues of the child." During her testimony, Dr. Dewar testified about the procedures she followed while conducting an interview and about her physical examination of each of the girls. Dewar also testified that the examinations were made for the purpose of medical diagnosis.

[**P103] A trial court should exclude testimony under the rule of *Dever* "only in cases where there is affirmative evidence of improper motivation." *State v. Sheppard, 164 Ohio App. 3d 372, 2005 Ohio 6065, at P35, 842 N.E.2d 561* (citation omitted).

[**P104] Appellant objects to the admission of the aforementioned statements because the trial court failed to voir dire T and D in order to establish a foundation for the admission of the testimony.

[**P105] This court has held that although a voir dire of the child is desirable, *Dever* "does not actually mandate a voir dire." *State v. Cornwell (Feb. 27, 1998), 95-T-5379, 1998 Ohio App. LEXIS 806, at *31*. Moreover, courts have found that "failure to conduct such a voir dire *** is not fatal to the admissibility of evidence under *Evid.R. 803(4)*, if the medical professionals and child are available for cross-examination." *Sheppard, 164 Ohio App. 3d 372, 2005 Ohio 6065, at P36, 842 N.E.2d 561*; *State v. Kelly (1994), 93 Ohio App.3d 257, 264, 638 N.E.2d 153*; *State v. Crum (Oct. 26, 1998), 9th Dist. No. 97-CA-0134, 1998 Ohio App. LEXIS 5678, at *12*; *State v. Slane (Oct. 22,* [*76] *1999), 6th Dist. No. F-98-020, 1999 Ohio App. LEXIS 4925, at *44*; *State v. Demiduk (June 24, 1998), 7th Dist. No. 96-C0-16, 1998 Ohio App. LEXIS 3287, at *14-16*. Such was the case here.

[**P106] Under the circumstances presented herein, where both victims and Dr. Dewar testified and were subject to cross-examination, *and* where the undisputed physical evidence was consistent with their testimony, I cannot conclude the admission of the aforementioned testimony was plain error.

[**P107] Even if any of the aforementioned statements had been excludable as hearsay, "trial counsel's failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel." *State v. Bradford, 9th Dist. No. 22441, 2005 Ohio 5804, at P27* (citation omitted); see also *State v. Holloway (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831*, citing *State v. Lytle (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623* ("[t]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. To

prevail *** a defendant must *** show *** a substantial violation of any of defense counsel's essential duties *** and *** that he was materially prejudiced by counsel's ineffectiveness").

[**P108] Here, appellant has failed to demonstrate either a substantial violation of counsel's duties or material prejudice. Since there was no plain error in the admission of the testimony of Bethany Askew or Dr. Dewar, there can be no ineffective assistance claim for failure of defense counsel to object.

[**P109] For these reasons, I respectfully dissent. The judgment of the Ashtabula [***32] County Court of Common Pleas should be affirmed.